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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-1068

RICHARD M. JONES, Petitioner

V.

NOR-TEX AGENCIES, INC., W. E. RILEY, CHARLES OWEN AND CONTINENTAL NATIONAL BANK OF FORT WORTH,
Respondents

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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COMMERCIAL RECORDER, FORT WORTH, TEXAS—1-7-74—60

## INDEX


| | Page |
|---|---|
| The Opinion Below | 2 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Constitutional Provisions Involved | 6 |
| Statutes and Regulations Involved | 6 |
| Statement of the Case | 7 |
| The Nor-Tex Action | 11 |
| The Riley Action | 15 |
| The Owen Action | 19 |
| Reasons for Granting the Writ | 26 |
| Conclusion | 54 |
| Appendix | 55-112 |
| A—Opinion of the Court of Appeals | 55 |
| B—Judgment of the District Court | 74 |
| C—Pertinent Text of Statutes and Regulations | 99 |
| D—Text of Settlement Agreement of Respondents | 104 |
| Certificate of Service | 113 |

## CITATIONS


| Cases: | Page |
|---|---|
| American Power & Light Co. vs. S.E.C., 320 U.S. 90 (1946) | 54 |
| Anderson vs. Eliot, 333 S.W. 2d 654 (Tex. Civ. App. 1960, err. ref.) | 31 |
| Atkinson vs. Roth, 297 F. 2d 570 (3d Cir. 1961) | 40 |
| Bolling vs. Sharpe, 347 U.S. 693 (1954) | 36 |
| Clement A. Evans & Co. vs. McAlpine, 434 F. 2d 100 (Fifth Cir. 1970) | 37 |
| Contract Buyers League vs. F & F Investment, 300 F. Supp. 210 (N.D. Ill. 1969) | 30 |
| Darwin vs. Jess Hickey Oil Corp., 153 F. Supp. 667 (N.D. Tex. 1957) | 30 |
| Dupont vs. Southern Pac. Co., 366 F. 2d 193 (5th Cir. 1966), cert. denied 386 U.S. 958 (1967) | 40 |
| Galvan vs. Press, 347 U.S. 737 (1954) | 36,53 |
| Garfield vs. Strain, 320 F. 2d 116 (10th Cir. 1954) | 30 |
| Gilmore vs. James, 274 F. Supp. 75 (N.D. Tex.), affmd. 389 U.S. 572 (1968) | 39 |
| Graham vs. Clark, 332 F. 2d 155 (6th Cir. 1964) | 29 |
| Greene vs. McElroy, 360 U.S. 670 (1959) | 54 |
| Hammer vs. Sanders, 134 N.E. 2d 509 (Ill. 1956) | 30 |
| Hecht vs. Harris, Upham & Co., 430 F. 2d 1202 (9th Cir. 1970 | 37 |
| Joe Grasso & Son vs. United States, 42 F.R.D. 329, affmd. 380 F. 2d 749 (5th Cir. 1967) | 40 |
| Kuehnert vs. Texstar Corp, 412 F. 2d 697 (5th Cir. 1969) | 37 |
| Liner vs. Watkins Land Mortgage Co., 68 S.W. 311 (Tex. Civ. App. 1902) | 44 |
| Lynn vs. Caraway, 252 F. Supp. 858, affmd. 379 F. 2943 (5th Cir. 1966) | 30 |

**CITATIONS—(Continued)**


| | Page |
|---|---|
| Ochoa vs. Hernandez, 230 U.S. 139 (1913) | 44,53 |
| Pawgan vs. Silverstein, 265 F. Supp. 898 (S.D. N.Y. 1967) | 30 |
| Polikoff vs. Levy, 204 N.E. 2d 807 (Ill. 1965), cert. denied, 382 U.S. 903 | 30 |
| Romney vs. Richard Prows, Inc., 289 F. Supp. 313 (D. Utah 1968) | 30 |
| Royal Air Properties, Inc. vs. Smith, 312 F. 2d 210 (9th Cir. 1962) | 37 |
| S.E.C. vs. C. M. Joiner Leasing Co., 320 U.S. 344 (1943) | 31,52 |
| S.E.C. vs. Ralston Purina Co., 346 U.S. 119 (1953) | 52 |
| S.E.C. vs. W. J. Howey Co., 328 U.S. 293 (1946) | 31,52 |
| S.E.C. vs. Wood, 5 S.E.C. Jud. Dec. 3 (D.C. Fla. 1946) | 30 |
| Schneider vs. Rusk, 377 U.S. 163 (1964) | 36,53 |
| Sun-X Glass Tinting of Mid-Wisconsin, Inc. vs. Sun-X International, Inc., 227 F. Supp. 365 (W.D. Wisc. 1964) | 40 |
| Tobacco & Allied Stock, Inc. vs. Trans-America Corp., 244 F. 2d 902 (3rd Cir. 1957) | 37 |
| United States vs. Knauer, 149 F. 2d 519 (7th Cir. 1945) | 40 |
| Vicioso vs. Watson, 32 F. Supp. 1071 (C.D. Cal. 1971) | 30 |
| Wise vs. Cecil, 135 S.W. 2d 235 (Tex. Civ. App. 1939, err. ref.) | 44 |


**Constitution, Statutes and Rules:**


| | |
|---|---|
| Amendment 5, United States Constitution | 5 *et seq.* |
| Securities Act of 1933, 15 U.S.C. Sections 77a *et seq.* | 5 *et seq.* |
| Securities Exchange Act of 1934, Sections 78a *et seq.* | 6 |
| Securities and Exchange Commission Rule 10b-5 | 6 *et seq.* |
| 28 U.S.C. Section 1254(1) | 2 |

**CITATIONS—(Continued)**


| | Page |
|---|---|
| Rule 13, F.R.C.P. | 16,43 |
| Rule 20, F.R.C.P. | 39 |
| Rule 24, F.R.C.P. | 39 |
| Rule 42, F.R.C.P. | 39 |
| **Miscellaneous:** | |
| 72 C.J.S. 139, "Pledges", Sec. 69 | 44 |
| 46 Tex. Jur. 2d 202 et seq., "Pledges", Sec. 8-14 | 44 |
| Securities Act Release No. 185 (1934) | 31 |

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Petitioner Richard M. Jones prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on July 26, 1973, petition for rehearing denied on October 11, 1973.

## OPINION BELOW

The opinion of the Court of Appeals is not yet reported. It affirmed *in toto* the judgment of the District Court, and is shown in the Appendix, *infra*. There was no separate opinion by the District Court, and its judgment also appears in the Appendix, *infra*.

## JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 26, 1973, and petition for rehearing denied on October 11, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

## QUESTIONS PRESENTED

This suit involved the trial before a single jury, over petitioner's protest, of three separate and distinct asserted actions against him by three different plaintiffs, each claiming violation of the anti-fraud provisions of the Federal Securities Acts in unrelated transactions. Respondent Nor-Tex Agencies, Inc. (herein called Nor-Tex), sought to rescind in its en-

tirety a joint drilling and production program engaged in with petitioner on oil and gas leases in Caldwell and Guadalupe Counties, Texas, commencing in September, 1968 and extending over several months, many leases and wells. Respondent W. E. Riley (herein called Riley) sought to rescind his purchase from petitioner and respondent Owen in July, 1968, of a one-third fee interest in 420 acres of suburban realty located on the outskirts of the City of San Antonio, Bexar County, Texas. Respondent Charles Owen (herein called Owen) sought damages, rather than rescission, on his prior purchase of a one-half fee interest in the same Bexar County realty in May, 1967. Respondent Continental National Bank of Fort Worth (herein called the Bank) held as collateral pledgee the vendor's lien notes given by both Riley and Owen for their respective Bexar County land purchases, and the Bank prevailed on the trial court to strike and dismiss petitioner's counterclaims for foreclosure of these notes. The questions presented are:

1. Whether the separate purchases by Riley and Owen of their undivided fee interests in land were security transactions triable by the loose and plaintiff-oriented rules of technical fraud evolving in S E C injunction and corporate "insider" trading cases under the Federal Securities Acts, or real estate transactions triable by more traditional rules relating to claims of fraud under state or common law.

2. Whether the oil and gas lease transactions with Nor-Tex, wherein Nor-Tex owned the dominant working interest, were securities transactions triable under the Federal Securities Acts without resort to pleaded common law defenses, or cooperative drilling and production ventures under the particular facts of this case where petitioner was entitled to jury submission of his defensive theories of waiver, ratification, estoppel, mutual scienter, *pari delicto* conduct, solicitation and election.

3. Whether it was prejudicial error and an abuse of discretion under all the circumstances for the trial court to deny petitioner's motion for severance and compel him to defend the claims of Nor-Tex, Riley and Owen in a single trial before the same jury.

4. Whether it was prejudicial error and the denial of a vested right for the trial court to strike the counterclaims of petitioner on the Riley and Owen notes under all the circumstances, or whether the Bank alone could elect to seek foreclosure as held by the courts below.

5. Whether the trial court's exclusion from evidence before the jury of the settlement agreement entered into between Riley, Owen and the Bank during pendency of this suit, without joinder therein by Jones, constituted such fundamental error in blindfolding the jury and distorting the facts as to be a violation of due process of law, as guaranteed by the

Fifth Amendment to the United States Constitution. (Such settlement agreement, identified as Jones' Exhibit 164, is set forth in the Appendix, *infra.*)

6. Whether the judgment relief awarded to Owen, and affirmed by the Court of Appeals, amounts to multiple recovery so far in excess of that to which he was entitled by his pleadings and the evidence as to constitute a deprivation of property of the petitioner in violation of due process of law, as guaranteed by the Fifth Amendment to the United States Constitution.

7. Whether the cumulative effect of the assigned errors embraced by the foregoing questions and other claimed errors assigned in the Court of Appeals—that is, denial of severance, striking of counterclaims, refusal to submit defensive theories in the charge or instructions, global submission of issues on alleged misstatements and omissions without specification, improper comments in the charge, exclusion of offered evidence, limiting instructions on other evidence, and award of excess recovery—is such under all the circumstances as to show denial of fair trial to the petitioner and constitute a violation of due process of law, as guaranteed by the Fifth Amendment to the United States Constitution.

8. If all the foregoing actions assigned as error are rendered harmless and compelled by application and construction of Rule 10b-5 of the SEC, as

apparently held by the trial court and Court of Appeals, then whether such rule and its application is either violative of the intent of Congress in delegating rule-making authority to the SEC or the unconstitutional delegation of legislative authority to the SEC. (Petitioner does not concede that construction of Rule 10b-5 compels such actions, and says the courts below have violated the intent of both Congress and the SEC in its application.)

## CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is Amendment V of the United States Constitution, the pertinent provision of which reads: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

## STATUTES AND REGULATIONS INVOLVED

The federal statutes involved are the Securities Act of 1933, 15 U.S.C. Sections 77a *et seq.*, and particularly Sections 77b(1), 77c(a)(11), 77d(2), 771 (2) thereof, and the Securities Exchange Act of 1934, 15 U.S.C. Sections 78a *et seq.*, and particularly Sections 78c(a)(10), 78j(b) thereof. The pertinent provisions of these statutes are set forth in the Appendix, *infra.*

The federal regulation involved is Securities and Exchange Commission Rule 10b-5, 17 C.F.R. Section

240.10b-5 (1972). The text of this rule is also set out in the Appendix, *infra*.

## STATEMENT OF THE CASE

The suit originated in the United States District Court for the Northern District of Texas by complaint filed on September 9, 1969 by respondent Nor-Tex Agencies, Inc., as sole plaintiff, against petitioner Richard M. Jones, as sole defendant. It sought rescission of an entire joint drilling and development program in which Jones and the corporation had participated during a ten-month period from September, 1968 through June, 1969, involving the acquisition of fifteen different oil and gas leases, the drilling of eleven different oil wells (eight completed as producers and three dry holes), and the operation of numerous wells already producing on the acquired leases. The basis for federal jurisdiction was claim of misrepresentations and omissions under the Federal Securities Acts (15 U.S.C. Sections 77 and 78). Jones answered this complaint by pleading that these were not securities transactions, but joint drilling and development ventures wherein Nor-Tex was the soliciting party and owner of the dominant working interests, or alternatively, that they were exempt as private transactions between two Texas residents, and that right of rescission was barred under doctrines of waiver, estoppel and ratification because of acquiescence in expenditure of advanced funds in drilling and production

costs, retention of oil runs without contribution to operating expenses, resulting in dissipation of production capability of producing wells, and by its *pari delicto* participation.

On June 30, 1970, Nor-Tex filed a motion for leave to amend upon an asserted intention to add parties and allege additional grounds for recovery and on the same day, without notice or opportunity for hearing to Jones, obtained entry of an order permitting amendment and simultaneously filed its amended complaint. The amendment did not urge additional ground of recovery by Nor-Tex, as the motion falsely implied, and its entire purpose was to add respondent W. E. Riley as a new plaintiff on an entirely separate alleged cause of action against Jones, Owen and the Bank, the latter two being added as new defendants. Respondent Owen immediately filed his crossclaim against Jones and the Bank on still a third independent cause of action. The amendment was pursuant to a pre-conceived plan and agreement between Riley and Owen to thereby abandon a pending suit in a Texas court against Jones, wherein they simultaneously took non-suits, and append their unrelated actions to the Nor-Tex claims in Federal Court, for the express purpose of reaping benefit of the prejudice that thereby subsequently resulted to Jones in the trial of this case. Both Jones and the Bank promptly filed motions to sever the new and independent action asserted by Riley for separate trial, the Jones motion also seeking severance of the

cross-claim of Owen. These motions were overruled by the trial court, and Jones was compelled to defend all three diverse actions before a common jury.

As thus originally accomplished, the joinder of the diverse claims of Nor-Tex, Riley and Owen for single trial was a technical fraud upon the trial court, as well as Jones and the Bank. By its abuse of discretion in refusing severance, however, and subsequent erroneous rulings in dismissing the counterclaims of Jones, altering trial procedure, excluding and limiting evidence, comments and method of submission in its charge, and refusal to submit defense theories to the jury, the trial court became the unwitting dupe of respondents Nor-Tex, Riley and Owen in presenting a distorted case to the jury contrary to the real facts. These actions, hereafter more fully set forth, enabled the respondents to "brother-in-law" the petitioner by making it appear that the three separate asserted causes of action were part of a common scheme, when the evidence conclusively shows they were not, by in effect judicially enforcing a unilateral settlement between the Bank and said three respondents *pendente lite*, which not only conflicted with their pleaded actions and sought relief, but also prejudiced petitioner by altering rights of the litigants, reducing the Bank to a mere nominal party and depriving Jones of a vested right to affirmatively defend the case through mandatory counterclaims, and by indelibly aligning the trial court on the side of the respondents in the minds of

the jurors, leaving petitioner alone on the opposite side of the case. The cumulative effect was fundamental denial of due process by progressive steps eliminating any possibility of fair trial before the jury.

The diverse nature of the three joined actions will be hereafter stated, but their severability strikingly appears from the chronology of their origins. Nor-Tex, the original sole plaintiff, sought to rescind contracts which the corporation entered into with Jones to jointly explore for and produce oil, the first such contract being dated September 12, 1968. Riley sought to rescind a deed, his purchase money note and deed of trust by which he purchased a one-third fee interest in realty on July 29, 1968, which the undisputed evidence showed was only a few days after he first met Jones and prior to Jones having even heard of the existence of the corporation, Nor-Tex. Owen sought to recover damages and cancellation of his purchase money note and securing deed of trust on his purchase of a one-half fee interest in land on June 9, 1967, which the evidence shows without dispute was more than a year prior to Jones having met Riley or even having heard of Riley or Nor-Tex. This chronology of origin was in reverse order to the appearance of the asserted actions in pleadings in the case. Over objection of petitioner, however, the trial court permitted Owen, ostensibly a defendant, to present evidence on his crossclaim against Jones first in the trial, and then Riley to testify con-

cerning his individual cause of action in advance of evidence by the original plaintiff-Nor-Tex, assertedly to avoid confusion of the jury on chronology of events. Thus, the jury was presented from the very outset of the trial with the cooperative effort of the trial court and the respondents Nor-Tex, Riley and Owen in documenting the events against Jones, thereby implying relation that in fact did not exist between the actions.

*The Nor-Tex Action.* As aforesaid, this corporate respondent sought retrospective rescission of a completed drilling and development program covering acquisition of fifteen separate leases, drilling of eight producing wells and three dry holes, and the reworking and production of numerous wells already in existence on the leases. These operations were embraced by four separate contracts between the corporation and Jones, two dated September 12, 1968, and the others dated January 6 and February 24, 1969, respectively. The contracts provided that Nor-Tex would acquire 75% of 70% working interest leases, thereby assuming obligations to develop and operate same, that Jones as agent for Nor-Tex would supervise the drilling and producing, with drilling to be done at his expense for a turnkey price of $32,000.00 for each producing well completed and equipped and $10,000.00 for each dry hole drilled, and that Nor-Tex would pay "all normal operating expenses". The grounds alleged for rescission were violations of the anti-fraud provisions of the Securities Acts.

Petitioner's answer to this complaint, in addition to claiming that these were joint venture rather than security transactions, or alternatively exempt private intrastate transactions, also alleged that Nor-Tex was barred from the remedy of rescission by the doctrines of estoppel, waiver, ratification and *pari delicto* participation. Basis for these latter claims, as shown both by his pleadings and the trial testimony of Jones, was that Riley, as President and agent of Nor-Tex, was an extremely knowlegeable and experienced investor who acted as initiator of the transactions, seeking out and soliciting Jones to find available leases in the Caldwell and Guadalupe County area, inducing Jones to foresake his other pursuits in order to engage in a program to acquire immediate production and rapid drilling, rejecting the suggestion of Jones that he drill at actual cost and insisting on turnkey prices with Jones to bear the risk of any drilling and equipping difficulties, expressly agreeing that Jones was to be compensated by retention of whatever interest or profit he could retain over and above the agreed percentage working interest and purchase price to the corporation on leases, and stating to Jones that the corporation's interest was not profit in the acquisition and drilling of leases, but tax benefits in write-off of intangible development costs and depletion allowance on production and the quick acquisition of a great number of producing wells for the stated purpose of Nor-Tex transferring its interest in same to Rey-Tex Petroleum Company, which was to be a public corporation whereby Riley

and Nor-Tex expected to reap huge profits by selling stock to the general public. Jones further pleaded and testified that Riley and Nor-Tex knowingly sat by as the lease acquisition and drilling and development program proceeded step by step, realizing that the funds advanced were being expended in lease purchases, drilling and equipping expenses, without objection of any kind and with full disclosure over a period of many months, retaining the Nor-Tex percentage of production income without contributing to operating costs, thereby knowingly causing decline in production and shut-in of many of the producing wells during pendency of this suit because of lack of operating funds on the part of Jones, with Riley and Nor-Tex employing their own independent petroleum consultant to evaluate the properties at a sum far in excess of Nor-Tex's expenditures, and that this suit and numerous state court actions were instituted against him by Riley as spite actions in retaliation for the refusal of Jones in June, 1969 to convey his interest in the Nor-Tex leases to the Rey-Tex Petroleum Company at a lesser price than Nor-Tex was to receive, or in exchange for Rey-Tex stock, which transfer had never been a part of the original agreement between Jones and Nor-Tex.

While Riley did testify at the trial on claimed misrepresentations by Jones concerning drilling costs, production potential, rate of return of development costs and lease values in the area, all of this was denied by Jones, raising a direct conflict in the evidence.

In corroboration of his denials and rebuttal of Riley's claims, Jones offered in evidence a number of documents, consisting of the evaluation report on the properties made by Mr. Radtke, a petroleum consultant paid by Riley, and various written materials and correspondence received by Riley from his friend named Reynolds, who was Riley's associate in organizing Rey-Tex Petroleum Company, (which documents were identified in evidence as Jones' Exhibits 64, 47, 112A through G, 113, 113A, 144 and 148), all of which documents Jones testified were delivered to him by Riley, the Radtke report in an effort to induce Jones to convey his interest in the leases to Rey-Tex and the others at the inception of the production acquisition and drilling program with Nor-Tex in order to induce Jones to enter into the joint endeavor. These documents were relevant and admissible both in rebuttal and impeachment of Riley's testimony, showing not only another source to Nor-Tex of the information which it claimed constituted misrepresentation by Jones, but in fact demonstrating as between Jones and Nor-Tex that Nor-Tex was the author of such representations. These materials contained virtually all of the statements relative to drilling cost, production potential, rate of return, etc., which Riley attributed to Jones. On objection by Riley and Nor-Tex, however, the trial court erroneously limited the jury's consideration of all such materials to being mere opinions of whoever authored them, thereby depriving petitioner of their impeaching and rebuttal effect. The Radtke report was in conflict with the

conclusions as to value expressed by the expert witnesses produced by Nor-Tex at the trial, and was also admissible in rebuttal of those conflicting opinions.

*The Riley Action.* This action, asserted by the amended complaint, sought rescission of Riley's individual purchase of a one-third fee interest in a 420-acre Bexar County farm from Jones and Owen, also alleging misrepresentations and omissions violative of the Securities Acts. The documents relating to this transaction were the deed from Jones and Owen conveying a one-third interest in the realty to Riley, Riley's note for a deferred balance of his purchase price, and a securing deed of trust on the land. The evidence showed without dispute that Riley and his own attorney representing him in the transaction were aware of and acquiesced in the immediate pledging of such note by Jones and Owen to the Bank, as collateral security on the prior vendor's lien note held by the Bank on the same property. In the amended complaint, Riley claimed that the Bank was an active participant in the alleged fraud and sought cancellation and rescission of the note and deed of trust, as well as the deed of conveyance.

Jones answered these allegations by pleading lack of jurisdiction because not a security transaction, but a non-public intrastate real estate transaction, and that Riley was barred from rescission by doctrines of estoppel, acquiescence, waiver, election and ratifica-

tion, because of his participation in pledge of the note to the Bank, retention of benefits, and inability to restore the *status quo*. As required by the compulsory counterclaim provision of Rule 13, F.R.C.P., Jones also sought recovery on Riley's purchase money note and foreclosure of the securing vendor's and deed of trust lien. Owen's reply was denial of the material allegations of Riley's claims, including a denial that the transaction involved a security. He sought to disclaim any knowledge or responsibility for the alleged representations by Jones, but not deny the same. By the same pleading, he filed his cross-claim against Jones on an earlier transaction, hereafter stated. The Bank also filed denial that the transaction involved a security.

As above stated both the Bank and Jones filed motions to sever this action for separate trial from the action of Nor-Tex. The Bank also filed a motion to dismiss the counterclaim of Jones upon Riley's note, claiming that it alone could decide whether to seek foreclosure in the court proceeding. Shortly prior to the commencement of trial, the Bank, Riley and Owen entered into a settlement agreement, without the consent or joinder of Jones, whereby contrary to their pleadings, Riley and Owen agreed that the notes and liens held by the Bank were valid and prior to their claims against the Bexar County property, and in return the Bank agreed to postpone any foreclosure attempt until after trial of this case and entry of judgment herein, and even then to first assign its

notes and liens to Riley or Owen before foreclosure upon payment to it in full of principal and accrued interest only. By such agreement, Riley and Owen contracted to recognize the Bank's priority and validity of the notes and liens held by it despite conflict with their pleadings in this case and irrespective of any judgment that the Court might render herein. Such agreement is set forth in the Appendix, *infra*.

The trial court did not pass upon the motions for severance and the Bank's motion to dismiss the counterclaims of Jones until November 15, 1971, the date of jury selection in this case, thereafter signing an order on November 17, 1971, after commencement of trial, refusing the severance and dismissing or striking the counterclaims of Jones. Of course, after prevailing on its motions to dismiss the Jones counterclaims for foreclosure on the notes and entering into its surreptitious settlement agreement with Riley and Owen, the Bank did not actively urge its motion for severance thereafter, becoming in effect a nominal party only to the litigation.

In the trial, Jones offered in evidence the settlement agreement (identified as Jones' Exhibit 164) in order to show the collusion between respondents, in impeachment of the trial pleadings of Riley and Owen, and in support of his claims of estoppel, waiver, ratification and election against both Riley and Owen. On objection of the respondents, however, the trial court wrongfully refused to admit this evidence be-

fore the jury, admitting it only for the trial court's private consideration.

In his trial testimony, the only omission that Riley claimed with respect to the Bexar County land was a failure of Jones and Owen to tell him what they paid for the property. However, Jones and Owen both testified that Riley did not inquire of their purchase price, which Riley admitted. Riley also testified that he made his own personal inspection and investigation concerning the Bexar County land, thereby destroying as a matter of law any materiality concerning the purchase price. Riley sought to claim reliance and misrepresentation on oil potential of the property; however, he admitted that he knew the outstanding oil lease on the property was owned by a third party, that he realized any discussion about increasing oil potential was dependent on a hope of himself, Jones and Owen being able to thereafter purchase such outstanding lease, and that this anticipated future purchase never occurred, thus destroying the relevance or materiality of any such discussion. While he testified that he relied on Owen and Jones to manage the property, this was frivilous, because he admitted that he held his own title, never giving any power of attorney to the other parties, so that their relationship was that of legal co-tenants, with neither Owen nor Jones having any right or power to bind him on a lease or other agreement respecting the land.

*The Owen Action.* By crossaction against Jones only, Owen sought to recover damages for fraud alleged in his purchase of an undivided one-half fee interest in the same Bexar County land from Jones on June 9, 1967. This transaction was also accomplished by a deed to Owen from Jones, and by a note from Owen to Jones for a part of the deferred purchase price, together with a securing deed of trust, which note and deed of trust were likewise pledged by Jones with the knowledge of Owen to the Bank as collateral security on the prior vendor's lien note of Jones held by the Bank against the same land. Owen's pleading was that he and Jones entered into a joint venture to purchase this land from a third party, Robert Maddox, on a 50-50 basis, and that the mechanics of taking title first in the name of Jones with subsequent conveyance of a half interest to him was in order to hide his presence in the transaction from Maddox to get a more advantageous purchase price. His only claim of misrepresentation was that Jones told him the purchase price from Maddox was $260,000.00, whereas in truth it was claimed to be $125,000.00. These allegations effectively negative any security transaction, and it was only in the alternative that Owen even pleaded a security transaction, alleging general misrepresentations and omissions, but offering no proof thereon.

The answer of Jones to this crosssaction was similar to that filed against Riley, denying the existence of a security transaction or any misrepresentation or

omission, and here too Jones timely filed his motion to sever such crossaction for separate trial and asserted counterclaim for recovery on and foreclosure of the vendor's lien note and deed of trust given by Owen. He also pleaded estoppel, ratification, waiver and election for similar reasons, including the joint sale by Owen to Riley as an additional ground therefor. The Bank also filed motion to dismiss this counterclaim.

The same statement with regard to the denial of severance, striking of his counterclaim and erroneous refusal to admit in evidence the settlement agreement of Riley and Owen with the Bank applies to the Owen action, as above stated with respect to the Riley action. The trial court thus deprived Jones of his right of counterclaim and fundamentally relevant evidence to support his theories of defense, creating an unreal state of supposed facts for jury consideration, blindfolding the jurors as to the real state of affairs between the parties. Owen's trial testimony was even more opposed to the existence of any security transaction than was his pleading, because he swore under oath that he and Jones were not merely joint venturers in acquiring the property, but actual partners. He further testified that he actively participated as a partner in the management of the property after acquisition, handling the bank account and negotiating for gravel leasing, as well as corresponding with the surface tenants. The testimony of Jones was in direct opposition to that of Owen, Jones claim-

ing that he made full disclosure to Owen, who knew the actual purchase price being paid by Jones to Maddox and the profit that Jones would realize on the subsequent sale to Owen. Stripped of the facade which respondents attempted to build around it, the Owen action was nothing but a claim of common law fraud for alleged misrepresentation of purchase price. Its joinder with the Nor-Tex action and pursuit in Federal Court as a securities case was only to confuse the jury and reap prejudice against Jones by collusive action with other respondents.

Thus compelling Jones to jointly defend these separate actions in a common trial, the trial court further precluded any fair chance of a verdict for Jones by refusing to submit his defensive theories in the charge, and refusing to submit issues relating to particular claimed misrepresentations or omissions. While the charge submitted separate series of issues as to each of the three plaintiff-respondents, the questions asked were still global in nature, as to whether "any" material misrepresentation or omission was made, leaving it impossible to determine from the answers what particular alleged facts the jury had in mind, and making it probable that the jury used facts relevant only to one cause of action in answering the similar questions as to a separate cause of action. Such confusion by the Court of Appeals is even apparent in its opinion, wherein that Court stated that the Owen, Riley and Nor-Tex transactions were all "investment contracts" wherein Riley

and Owen relied on the expertise of Jones in the oil and gas field for profit. Contrary to this assertion, it was only on the Riley transaction that an issue as to whether an investment contract existed was even submitted to the jury, and both the testimony of Owen and Riley expressly negative any oil expertise by Jones to produce profit in Bexar County, because each expressly admitted that Jones could not be expected to do anything toward oil production on that land unless and until the three of them subsequently acquired the outstanding lease from a third party, which never occurred.

Moreover, the evidence was sharply conflicting as to relative expertise and sophistication of the parties in both the real estate and oil industries. While Owen and Riley claimed to be novices, Jones testified that they were each more experienced than he in both fields. The evidence showed that Riley was an avid and frequent real estate investor, and that he served on the loan committee of a Fort Worth bank regularly passing on loans on mineral properties. The evidence showed that Owen was a principal stockholder and managing officer of a concern engaged in the manufacture of oil well equipment, and that he was Secretary-Treasurer of still another corporation expressly engaged in the business of acquiring suburban properties for both real estate and mineral development, by published brochure holding out its officers as experts in these areas. This conflict in evidence, however, was negated and the submission of

public offer issues to the jury based on instructions concerning the relative experience of the parties rendered meaningless by the improper comments of the trial court in his verbal charge to the jury. Thus, for example, the trial court instructed the jury that the plaintiffs in this case were not knowledgeable in the oil and gas business or the risk expected therefrom, and that they could not form an opinion as to the risk involved without a large amount of expert knowledge and expert advice from other sources. Other improper comments by the court to the jury in his charge on the weight of the evidence were: that the Bexar County sale to Riley was the sale of a security under the Federal Securities Acts, that Jones had violated such Securities Acts in all transactions in evidence unless they were exempt as private offerings, that the jury should consider all information by Jones relative to increasing mineral production if the outstanding lease were acquired from the third party in answering issues on the Bexar County transaction, even though such outstanding lease was never acquired, that Jones and Owen were partners on the Bexar County sale to Riley by the undisputed evidence, and that usually the only motive to buy interest in land with oil production or in oil and gas leases was a desire for profit.

While Jones timely submitted requested issues on all of his defensive theories of estoppel, waiver, ratification, election and *pari delicto* participation to the trial court, all of these were refused. The case was

submitted to the jury only on global plaintiffs' issues that have become the vogue in the standard securities cases, as above stated, without definitive instructions to segregate the diverse causes of action or evidence pertaining thereto in the minds of the jurors. The jury, after argument and submission, promptly answered every issue for the respondents and against Jones, save and except a single issue denying exemplary damages to Owen. The motions of Jones for directed verdict and judgment notwithstanding the verdict were overruled, and judgment was entered on the verdict as next stated.

The trial court entered judgment for Nor-Tex against Jones for the sum of $356,981.64, together with interest and costs, for cancellation and rescission of all the lease assignments and drilling and development contracts sued upon, vesting title thereto in Jones, but subject to the fixing and foreclosure of a lien thereon for Nor-Tex to secure the payment of the money judgment.

The trial court awarded judgment to Riley in the sum of $81,763.77 against Jones and Owen, jointly and severally, together with interest and costs, for cancellation and rescission of the deed of a one-third interest in the Bexar County land to Riley, and his note and deed of trust thereon, subject to the fixing and foreclosure of a lien against said interest to secure payment of the money judgment, but without prejudice to the rights of the Bank, in accordance

with the terms of the unilateral settlement agreement between Riley and the Bank, which the Court had refused to admit before the jury.

The trial court awarded judgment to Owen against Jones in the sum of $67,500.00, together with interest and costs, and in addition thereto purported to fix and foreclose a lien on behalf of Owen against the one-half interest of Jones in the Bexar County property to secure the payment of such damage award, again without prejudice to the rights of the Bank under the concealed settlement agreement between Owen and it. In addition to this damage award and security interest, the trial court further awarded Owen judgment declaring that Jones held his interest in the Bexar County land in trust for the benefit of Owen, and further granted Owen judgment over against Jones for any sums that Owen might be required to pay on the joint and several judgment awarded Riley against Jones and Owen, without provision for any deduction or offset for the benefit that had been derived by Owen from the joint sale by him and Jones to Riley.

The motion for new trial by Jones raising the points urged on appeal was overruled by the trial court. The Court of Appeals for the Fifth Circuit affirmed the judgment of the trial court in its entirety, refusing to even correct the obvious multiple award to Owen in excess of that to which he was entitled under his own pleadings and proof. Thus,

disregarding all other claimed errors, Owen has in effect been awarded judgment rescinding his unpaid note which he expressly elected to affirm, fee title to all of the Bexar County land as against Jones, even though he testified that he contracted to buy only one-half interest therein, and full money damage award as if he had paid for the property in cash, whereas the undisputed evidence shows that he purchased on credit and the trial court expressly refused to consider the counterclaim of Jones for the balance of the purchase price, and judgment over against Jones for complete indemnification against the recovery awarded Riley, even though the evidence shows without dispute that Owen reaped one-half of the benefit of the joint sale to Riley. Thus, rather than being made whole by the judgment in his favor, Owen has been in effect awarded a windfall, despite the jury's express refusal to allow him exemplary damages.

Petitioner apologizes for the length of this statement, but respectfully says it is necessary, because the cumulative effect of these many ocurrences in the trial court is what so fundamentally demonstrates denial of due process through deprival of the right to fair and impartial trial.

## REASONS FOR GRANTING THE WRIT

I. *In holding that the separate purchases by Owen and Riley of undivided fee interests in realty were*

*the purchases of securities under the Federal Securities Acts, the Court of Appeals for the Fifth Circuit has extended application of the anti-fraud and private civil action scope of such Acts into an area heretofore regarded throughout the nation as constituting only real estate transactions, which extension is in conflict with prior decisions of the Courts of Appeals, contrary to the intent of Congress in adopting the Acts and of grave concern and import to the real estate industry throughout the United States. It is an extension of the Securities Acts, under the circumstances of this case, into areas of real estate law not heretofore considered or passed upon by this Court, but unwarranted under general principles heretofore enunciated by the Court.*

Jones conveyed to Owen a one-half interest in the Bexar County farm, and a year later the two of them conveyed to Riley a one-third interest therein, by ordinary real estate instruments, that is, warranty deeds with vendor's lien notes and securing mortgages. In each instance the grantee, of course, received title to an undivided interest in both the surface and mineral estates in the 420 acre tract of land, but the fractional mineral ownership arose merely as an incident to the passage of fee title. The courts below have here held that since the property was subject to an outstanding oil and gas lease, this necessarily resulted in transfer of a fractional undivided mineral royalty falling within the definition of securities in both the 1933 and 1934 Acts. Petitioner

has found no reported case going so far as to hold that an isolated sale of realty becomes a regulated security transaction merely because undivided mineral ownership results as an incident to passage of fee title. If this is so, then every sale or purchase of realty in America involving more than a single grantor or single grantee—or even without multiple parties if the land is burdened with a mineral lease or reservation—is the transfer of a security requiring registration or filing of an information statement for exemption with the Securities & Exchange Commission! In community property states, even husband and wife buying or selling a home would fall within the Acts because dealing with fractional mineral interests under such reasoning!

It is respectfully submitted that this cannot be the law, and that the review of this Court is here needed to place some limit on the mushrooming tendency of the lower federal courts to take dicta from opinions in SEC injunction and insider stock fraud cases, usually arising in the curtailment of mail order schemes to defraud which are more or less national in scope, and remove it from context to extend the so-called implied right of private civil action under SEC Rule 10b-5 into areas traditionally regarded as non-security transactions and not within the intent of Congress in passing the Securities Acts, thereby rewarding non-innocent investors seeking to repudiate their bargain after a completed private agreement has proven less profitable than hoped, but at

the expense of imposing penalties more onerous on the other private participant, with safeguards for due process and protection of his traditional rights more lacking, than those accorded defendants in criminal prosecutions. It is insisted that this is such a case, as to all three causes of action asserted against petitioner, but especially as to the real estate transactions on the Bexar County land.

There was no proof of an investment contract to bring the instant case within that exception to the rule that ordinary real estate sales cannot constitute security transactions. No issue inquiring as to investment contract was even submitted to the jury on the Owen purchase, and there was no evidence to support the jury answer on the Riley purchase, despite the contrary statement in the opinion of the Court of Appeals. The testimony of both Riley and Owen expressly negatived an agreement to look only to the seller for production of profits, and showed as a matter of law that only the legal relationship of co-tenants in ownership of land resulted from the transactions. No previous case can be cited holding such to be within the Federal Securities Acts.

The opinion of the Court of Appeals and holding of the trial court in the instant case is in direct conflict with the following holdings of other Courts of Appeal, federal district courts and state courts: *Graham vs. Clark*, 332 F. 2d 155 (6th Cir. 1964), holding that sale of one's 15/16 interest in an oil and

gas lease wasn't a security, even though the seller retained a production payment from 1/4 of the working interest; *Garfield vs. Strain*, 320 F. 2d 116 (10th Cir. 1954), holding that sale of a one-half interest in an oil and gas lease with the parties jointly obligated to operate is not a security; *Lynn vs. Caraway*, 252 F. Supp. 858, affmd. 379 F. 2943 (5th Cir. 1966), holding that transfer of an entire mineral leasehold estate is not a security, despite conveying only a fractional share to minerals; *Romney vs. Richard Prows, Inc.*, 289 F. Supp. 313 (D. Utah 1968), holding that a joint venture in condominium development of realty is not a security; *Pawgan vs. Silverstein*, 265 F. Supp. 898 (S.D. N.Y. 1967), holding that a general partnership in realty is not a security; *Contract Buyers League vs. F & F Investment*, 300 F. Supp. 210 (N.D. Ill. 1969), holding that individual contracts to purchase realty in an area from a common seller cannot be securities, despite fraud and misrepresentation; *Darwin vs. Jess Hickey Oil Corp.*, 153 F. Supp. 667 (N.D. Tex. 1957), holding that multiple individual sales of oil and gas leases cannot be securities, without expectation of profit from the seller's future efforts within the investment contract rule; *S.E.C. vs. Wood*, 5 S.E.C. Jud. Dec. 3, (D.C. Fla. 1946), holding that a deed conveying realty subject to an outstanding oil and gas lease and reserving the seller's retained royalty cannot be a security; *Vicioso vs. Watson*, 32 F. Supp. 1071 (C.D. Cal. 1971); *Polikoff vs. Levy*, 204 N.E. 2d 807 Ill. 1965), cert. den'd., 382 U.S. 903; *Hammer vs. Sanders*, 134 N.E. 2d 509

(Ill. 1956); *Anderson vs. Eliot*, 333 S.W. 2d 654 (Tex. Civ. App. 1960, err. ref.). It even conflicts with the Security and Exchange Commission's own ruling that a landowner's sale of his retained 1/8 royalty interest is not transfer of a security. Securities Act Release No. 185 (1934).

The holdings of the courts below in the instant case are also in conflict with the general principles laid down by this Court in the controlling cases of *S.E.C. vs. W. J. Howey Co.*, 328 U.S. 293 (1946), and *S.E.C. vs. C. M. Joiner Leasing Co.*, 320 U.S. 344 (1943). There this Court did hold that traditional real estate transactions could become securities transactions under the Acts in public promotion cases where investors were led to expect profit from efforts of the promoter sufficient to create an investment contract under the statutory definitions. The Court defined investment contract as being an agreement to invest in a common enterprise for profit to come *solely* from efforts of the promoter or a third person, without any participation by the investor. The courts below in the instant case, however, have here disregarded the requirement that the profit expectation must be without the buyer's participation, attempting to convert joint ownership of land as co-tenants into an implied agreement that only one of the co-tenants will manage the joint land. They have done this on the Bexar County actions by resorting to the fiction that Owen and Riley expected profits from oil by Jones increasing the oil production from the land, in the

face of undisputed proof that none of the parties owned the outstanding mineral leasehold on the property, all knowing full well that Jones could not even try to increase oil production unless they were later successful in purchasing the mineral leasehold from a third person, which they were never able to do.

Petitioner respectfully says that the opinion of the court below decides a new and important question of Federal securities law which, if allowed to stand, will open up another Pandora's box of litigation in an area not contemplated by Congress, and that it should be reviewed and settled by this Court.

II. *In upholding the trial court's refusal to submit to the jury any of the petitioner's theories of defense, either in the form of special issues or verbal instructions in the charge, under the evidence raising such issues in this case, the Court of Appeals has sanctioned procedural application of the Federal Securities Acts in such manner as too constitute a taking of this petitioner's property without due process of law in contravention of the Fifth Amendment of the Constitution, demanding correction by this Court's supervisory power, both in order to accord petitioner the equal protection of the law in federal court to which he is entitled and to prevent an unconstitutional precedent in federal procedure under the Securities Acts.*

The need for granting this writ for denial of due

process is most apparent in the Nor-Tex action, but the same unconstitutional procedural deprivation occurred in the Riley and Owen actions too. With respect to Nor-Tex's claims, its President Riley testified that he, as agent for the corporation, was induced to enter into the drilling and development contracts for Nor-Tex by various claimed misrepresentations and omissions on the part of Jones. Jones, on the other hand, testified to just the opposite, that is, that it was Riley on behalf of Nor-Tex that approached him and solicited his participation in the program, inducing Jones to enter into the agreements by supplying to Jones materials outlining the possibilities in the oil field containing virtually the same misrepresentations and the same omissions upon which Nor-Tex sought recovery. Jones further testified that he was induced by Nor-Tex to enter into the contracts and participate in the program by Nor-Tex's claimed desire to put together a quick drilling and lease acquisition program for prompt and immediate production, without regard to profit but for the purpose of write-off and to have producing properties for transfer to a corporation it was organizing for reaping its profits through sale of stock to the public. Jones also testified that Riley and Nor-Tex closely watched all steps during the months-long drilling and development program, with full knowledge of the expenditures of the funds advanced for use therein, and that this litigation developed as a spite suit in carrying out threats made by Riley to do so only when Jones later refused to convey his agreed interest in the oil prop-

erties to the other corporation organized by Nor-Tex and Riley at what Jones considered an unfair consideration. With this direct conflict in evidence, the plaintiff and defendant each contending the other was the instigator and moving force in the program, and with equally sharp conflict in evidence as to which was the more experienced and knowledgeable investor in oil properties, the trial court submitted only global plaintiffs' issues, inquiring if Jones made any misrepresentations or any omissions, and even verbally instructing the jury that Riley was inexperienced and had a right to expect more information than Jones supplied. With ample pleading and proof from Jones that the shoe was on the other foot, the trial court nevertheless refused to submit any of defendant's issues or to instruct the jury on the theories of defense, other than a general statement that Jones denied all that Riley claimed. The Court of Appeals affirmed, apparently on the belief that the Securities Acts required this unfair and discriminatory jury submission, in complete disregard of the facts that the anti-fraud provisions of Rule 10b-5 apply to buyers and sellers of securities alike.

The lack of equal treatment to Jones and Nor-Tex under such state of the evidence is patent, and simply because Nor-Tex elected first to resort to the courthouse cannot be a justifiable reason for such unequal treatment in a court. Similarly, in the Riley and Owen actions, the evidence showed without dispute that each of them had knowingly participated in

pledge of their unpaid purchase notes to the Bank, and then while this suit was pending had engaged in collusive out-of-court agreements with the Bank to recognize the validity of such notes and indemnify the Bank against loss in an effort to further their individual interests and prejudice Jones in this trial, yet the lower courts would recognize no right to submission of defensive theories of waiver, estoppel, ratification and election. Such unfair practices are reflective of another growing trend in the lower federal courts to deprive defendants of common law defenses in securities cases. While some curtailment of such defenses is perhaps justified in standard fact situations involving aggressive and experienced promoters against a gullible and ignorant investing public, this Court should not permit one-sided jury submission to be carried over into a case like the instant one where the evidence raises real question as to which of two private contracting parties is the unfair aggressor in isolated private transactions which are at best on the extreme fringe area of even being a security transaction. All three causes of action asserted against Jones involved transactions where the parties contracted for joint ownership of land, with real question as to which party was guilty of scienter, if any. In addition, the evidence indicated that Nor-Tex was certainly a *pari delicto* participant, at least, in the transactions to jointly develop and operate oil leaseholds. Rudimentary equitable principles, even without resort to the Constitution, should have re-

quired fair submission of the matters to the jury without blindfolding it.

This Court has held that the due process of law requirement of the Fifth Amendment, even though it has no equal protection clause by express wording, nevertheless prohibits Congress from enacting laws which do not operate equally on all persons in like circumstances, just as the Fourteenth Amendment similarly restricts the legislative powers of the states. *Schneider vs. Rusk*, 377 U.S. 163 (1964); *Galvan vs. Press*, 347 U.S. 737 (1954); *Bolling vs. Sharpe*, 347 U.S. 693 (1954). Of course, in deference to this prohibition, this Court also holds that Congressional legislation should be construed and interpreted to avoid discriminatory unconstitutional application, if possible. Therefore, if the Fifth Circuit is correct in holding that the anti-fraud and private action provisions of the Securities Acts deny Jones the right to have his defensive theories submitted to the jury in the instant case, then such Acts or the promulgation of Rule 10b-5 by the S.E.C. are unconstitutional, as unjustifiably discriminating between buyer and seller, and plaintiff and defendant, in a private security transaction. If such Acts do not compel this discriminatory application, then the refusal of the Court of Appeals to correct the erroneous submission by the trial court in the instant case is itself a denial of this fundamental requirement of due process. The decision of the court below is in direct conflict with these holdings of the Supreme Court, either in construction

of the Securities Acts or in their application under the instant facts.

Moreover, the approval of discriminatory submission to the jury, with no presentation of theories of defense in the instant case, is in basic conflict with many decisions of the Courts of Appeal and federal district courts. These courts have frequently held that one of the purposes of the 1934 Securities Act, and the anti-fraud and implied private action provisions thereunder, was to extend protection to sellers as well as buyers. Examples of cases holding that defenses denied petitioner in the instant case should be considered, including some by the Fifth Circuit itself, are: *Kuehnert vs. Texstar Corp.*, 412 F. 2d 697 (Fifth Cir. 1969) (*pari delicto* and unclean hands); *Royal Air Properties, Inc. vs. Smith*, 312 F. 2d 210 (Ninth Cir. 1962) (waiver and estoppel); *Hecht vs. Harris, Upham & Co.*, 430 F. 2d 1202 (Ninth Cir. 1970) (waiver and estoppel); *Tobacco & Allied Stock, Inc. vs. Trans-America Corp.*, 244 F. 2d 902 (Third Cir. 1957) (laches); *Clement A. Evans & Co. vs. McAlpine*, 434 F. 2d 100 (Fifth Cir. 1970), cert. denied, 402 U.S. 988. The last case expressly approved the propriety of instructing the jury to also consider in answering issues the sophistication and expertise of the plaintiff, which was not done in the instant case.

All three causes of action in the instant case are conflicting under the evidence as to which party is

the promoter and the promotee, and in the Nor-Tex and Owen transactions, even as to which is seller and purchaser, both involving testimony indicating that the parties to the litigation were actually cooperators in purchasing jointly from third parties. In each action, parties on both sides of the transaction were charging the other with the reprehensible conduct. No justification can be shown for discriminatory jury submission for one party simply because occupying the role of plaintiff, while blindfolding the jury without submission for the benefit of the defendant. Petitioner earnestly insists that this Court should grant this writ to review and correct this unconsitutional subversion of judicial process. The availability of non-statutory defenses in private actions under the Federal Securities Act is also an unsettled area of law on which this Court should speak, particularly in the instant case to avoid denial of basic constitutional rights of due process.

III. *In holding that the trial court did not err in refusing to sever the actions against petitioner by separate respondents for separate trial and in striking petitioner's counterclaims, the Court of Appeals has sanctioned departure from accepted judicial procedure to a degree that shocks the conscience, and condoned violation of and abuse of discretion under express provisions of the Federal Rules of Civil Procedure which makes a mockery of the intent of such rules, conflicts with prior decisions of its own and other courts of appeal, and constitutes denial of*

*vested rights belonging to the petitioner sufficient to itself constitute unconstitutional deprivation of due process of law.*

Consolidation of the actions of the three respondents for single trial in the instant case was not accomplished as an intervention under Rule 24, F.R.C.P., as this would have required notice and hearing to Jones prior to its accomplishment, which was not accorded. It was not a consolidation on the trial court's own motion under Rule 42, F.R.C.P., nor an original permissive joinder of plaintiffs under Rule 20, F.R.C.P., but instead it was secretly done by respondents joining in a plan to amend Nor-Tex's original plea, without notice of such purpose either to the trial court or the defendant (petitioner here). The Court of Appeals assertion that such was proper under Rule 20 is in direct conflict with *Gilmore vs. James*, 274 F. Supp. 75 (N.D. Tex.), affmd. 389 U.S. 572 (1968), holding that joinders thereunder must meet a twofold test to stand, to-wit: the claims must arise out of the same transaction, and must also involve a common question of fact or law. The Nor-Tex action meets neither test, and the Riley and Owen actions involve separate transactions and different facts, having only a similar question of law, at most.

All of the rules permitting joinder, however, are expressly conditioned on denial of consolidation for trial if such will result in prejudice to any party.

Obvious prejudice resulted to Jones in the instant case, which was completely ignored by the trial court. The refusal of the Court of Appeals to reverse for this reason is in direct conflict with repeated decisions of the lower Federal courts, including those of the 5th Circuit itself. *E. g.: Dupont vs. Southern Pac. Co.*, 366 F. 2d 193 (5th Cir. 1966), cert. denied 386 U.S. 958 (1967); *Atkinson vs. Roth*, 297 F. 2d 570 (3d Cir. 1961); *United States vs. Knauer*, 149 F. 2d 519 (7th Cir. 1945); *Joe Grasso & Son vs. United States*, 42 F.R.D. 329, affmd. 380 F. 2d 749 (5th Cir. 1967); *Sun-X Glass Tinting of Mid-Wisconsin, Inc. vs. Sun-X International, Inc.*, 227 F. Supp. 365 (W.D. Wisc. 1964).

The statement in the opinion below that all three causes of action involved common questions of fact and law and were part of a common scheme to defraud is an absurdity on this record, made simply to to avoid expensive retrial, because irreparable prejudice to Jones is patent on both the pleadings and evidence. The Jones-Owen transaction was in May, 1967, more than a year before Jones first met Riley, without any attempt by Jones or Owen to sell to anyone during the interval before their joint transaction with Riley in July, 1968. Riley and Owen collusively testified—and the jury incredibly found—that Owen did not even actively take part in the 1968 sale to Riley, except to join in the conveyance, and claim half the proceeds! To contend that this shows common fact issues and a common scheme is so far

from logic and reality, and so grossly unfair, as to cry for corrective review by this Court.

The record is absent any proof that Jones even knew of the existence of the corporation Nor-Tex before the first transaction with it in September, 1968. This action is based on acquisition and joint drilling, development and production of shared working interests in oil and gas leases in Caldwell and Guadalupe Counties, Texas, where Nor-Tex as owner of the dominant working interest assumed the legal obligation to the third-party landowners to develop, by written contract employing Jones to carry out this function for it. It is an unheard of departure from the accepted course of judicial proceedings, as well as from logic and equity, to hold that this presents common law and fact issues or a common scheme with Mr. Riley's prior purchase of fee interest in suburban San Antonio realty hoping for value appreciation from subdivision or industrial development in the future on adjoining surface properties, with neither right nor obligation to develop the mineral estate under lease to others. This Court should not let expense of new trial nor the lone individual status of Jones deter it from exercising judicial supervision to correct such obvious prejudicial denial of fair trial in a federal court and eliminate so fundamentally erroneous a federal precedent.

It is earnestly submitted that the lower court's opinion attempt to distinguish its own contrary hold-

ing in the Dupont case, *supra*, is ludicrous. One reason assigned for reversal in Dupont was that consolidation for single trial had placed one party in the dual role of both plaintiff and defendant, holding such created obvious prejudice and confusion on the face of the record as to the entire case, even though all claims arose from alleged negligence in a single automobile collision. Such is the exact situation, it is insisted, in the instant case, except that being claims of fraud, rather than negligence, and on three separate transactions with different parties, the prejudice is magnified. Owen was cast in such dual role as defendant and plaintiff here; his collusive election to pitch-in with Riley could only prejudice Jones in the joint trial. Although cast as a defendant by the pleadings, the trial court condoned the Bank's assumption of the conflicting role of plaintiff by wrongfully striking petitioner's counterclaims on the Owen and Riley notes, and compounded the error and prejudice to Jones by refusing admission in evidence of the collusive settlement contract with Riley and Owen. It was akin to one accused of three separate and distinct crimes being compelled to defend them simultaneously before a single jury, with alleged victims and codefendants on one being allowed to assume the role of prosecutor on others. Such basic unfairness has not heretofore been a part of American law, and petitioner says neither the Securities Acts nor SEC Rule 10b-5 required such departure in this case. Prejudice was increased here by Jones being compelled to pick from a jury panel with jurors who had sat

in trial of still a fourth case of alleged securities fraud against him by other plaintiffs but same counsel as for Riley and Nor-Tex.

Riley's suit was for cancellation and rescission of the deed by which he purchased his fee interest in the Bexar County land, and the note and securing deed of trust he gave therefor; Owen's suit was for damages for alleged fraud in his purchase, with pleading that his purchase note was invalid and unenforceable; Jones, as payee and owner of both notes, and the Bank, as holder thereof under a pledge as collateral security on a note by Jones, were both named defendants in the suit. Hence, claims for recovery on the notes and foreclosure of the securing mortgages (both notes being in default) were mandatory counterclaims as to both Jones and the Bank under the express wording of Rule 13, F.R.C.P., because arising from the very transactions sued upon. Owen elected as a matter of law to affirm the validity of his purchase note when he sought damages, in lieu of rescission, so that it was available by right as a set-off against any judgment he might recover in addition to being an affirmative defense to Jones. The right of Jones to assert counterclaims on the two notes is so basic and elementary as to make it almost incredible that their dismissal at commencement of trial could be countenanced in an American court of law.

Statement by the Court of Appeals in its opinion that Jones contracted away his right to sue on the

notes by the collateral pledges to the Bank is absolutely unsupportable. The holding is in direct conflict with the express provisions of the pledge agreements (admitted in evidence as Jones Exhibit 27 and Plaintiffs' Exhibit 37), which recited that the Bank took only a security interest in the pledged notes, that the pledgor "is and will be absolute owner of the Collateral", and imposed on the pledgor the duty to defend and uphold the pledged notes against anyone claiming interest therein adverse to the Bank. The counterclaims sought recovery expressly for the Bank to the extent of its interest in the notes, and already being a defendant in the suit, it was in fact the absolute duty of the Bank to itself assert the counterclaims, or at least abstain from any interference with the effort of Jones to do so. Owen as a joint pledgor on the Riley note also had the contractual duty to assert the counterclaim on it for the Bank. Refusal of the court below to reverse for this error was also in direct conflict with Rule 13, F.R.C.P., and fundamental pledge law, both at common law and in Texas. *72 C.J.S. 139, "Pledges"*, Sec. 69; *46 Tex. Jur. 2d 202 et seq., "Pledges"*. Sec. 8-14; *Liner vs. Watkins Land Mortgage Co.*, 68 S.W. 311 (Tex. Civ. App. 1902); *Wise vs. Cecil*, 135 S.W. 2d 235 (Tex. Civ. App. 1939, err. ref.).

This Court has held that due process of law inhibits the taking of one's property and giving it to another contrary to settled usages and modes of procedure. *Ochoa vs. Hernandez*, 230 U.S. 139 (1913).

Petitioner pleads that these deprivations of vested rights due him in this trial conflict with this guarantee of due process, and this Court should therefore review by certiorari and correct the same. The footnote assertion of the court below that such could only be harmless error because the jury found fraud in the inception is an absurdity, because the evidence was without dispute that the pledges to the Bank in each case occurred simultaneously with the purchases by Owen and Riley, respectively, and were agreed to by them. It's like saying prejudice occurred, but since the jury acted thereon, it won't be corrected. In lawsuits as in football an affirmative defense or counterclaim is the best defense, and without action by Jones to uphold the notes (which was thus denied him), the jury probably inferred that he admitted some defect in them, because the evidence showed they were both in default and unpaid! When this prejudice is coupled with the prejudice obviously resulting from the wrongful joinder of diverse claims of fraud, the influence on the jury thereby is undeniable.

IV. *The cumulative prejudice resulting from the assigned errors by the trial court, which the Court of Appeals for the Fifth Circuit has sanctioned by its affirmance, was such departure from accepted and usual course of judicial proceedings as to deprive petitioner of all semblance of a fair trial and constitute the taking of his property for benefit of the respondents without the due process of law guaranteed by the Fifth Amendment to the Constitution,*

*and their construction and application of the anti-fraud and private action provisions of the Federal Securities Acts and SEC Rule 10b-5 as justifying such departures are so in conflict with prior decisions of this Supreme Court as to warrant review and correction by exercise of its supervisory powers.*

This trial has been the most unfair civil trial in which undersigned counsel for petitioner has participated in 24 years of law practice, because the trial court systematically by its rulings destroyed any chance of favorable jury consideration for the defendant Jones prior to its receiving the case. This was the first "securities fraud" case tried by a relatively new federal judge, and it is believed that he was misled by adroit arguments of respondents' counsel that his erroneous rulings were necessitated by the claimed intent of the Federal Securities Acts and SEC Rule 10b-5. The Court of Appeals, it is respectfully insisted, has perfunctorily reviewed the case under the same misapprehension. Its opinion begs the real questions presented by the appeal by simply stating the plaintiffs' contentions as established fact, and disregarding the sharply conflicting evidence thereon. This is a permissible method of review in passing on sufficiency of evidence to support a finding, but in no way touches issues as to fairness of the trial and denial of due process.

Petitioner and his counsel—and also this Court, it is respectfully felt — cannot agree that the

stripping of due process safeguards from petitioner was either reasonable or required under such Acts and the unusual facts of these three diverse actions. Unless corrected in this certiorari proceeding, petitioner Jones stands convicted of technical civil fraud, with judgments for sums exceeding $506,000.00 rendered against him, even though expended for joint acquisition and development of property which has now in effect been awarded in its entirety to respondents, with virtually no possibility of ever being able to rehabilitate himself either as to reputation or economically. This has occurred in transactions which have been traditionally regarded as not being securities, and so considered by the parties. Strangely, the respondents retain the properties, with virtual assurance in a rising economy that they will realize the very profits they sought to claim in the trial had been misrepresented to them, plus their tax benefits, without deduction for their unpaid purchase commitments, despite unsubmitted issues on conflicting evidence as to which side was the instigator and more censurable party in the transactions.

Jones has thus been subjected to penalties far in excess of those risked in even a criminal proceeding under the Securities Acts, without the minimal safeguards and requirements for due process that are accorded a defendant in even the simplest criminal prosecution. It is submitted that this Court must set some limits on the disregard of due process rights and curtailment of defenses to which lower federal courts

can resort in their Don Quixotic fight at the shout of "fraud" and "security" by uninnocent private speculators, and that the facts and circumstances of this case make it the proper vehicle for such.

The step-by-step process by which the courts below erroneously eliminated the petitioner's entitlement to a fair trial in this case are briefly and numerically listed as follows:

1. By denial of his motion to sever, thereby requiring joint defense of the actions by Nor-Tex, and Riley, and Owen in a single trial, as above stated and discussed.

2. By dismissing and striking, on day of commencement of trial, his counterclaims on the Riley and Owen notes, as above stated and discussed.

3. By permitting over his objection the respondents to present evidence out of due order, thus giving appearance to the jury of chronological connection of the diverse actions which did not in fact exist.

4. By holding that Owen and Riley fee purchases were security transactions, rather than realty purchases, and so instructing the jury, as above stated and discussed.

5. By holding that the Nor-Tex contracts were security transactions, rather than joint venture agree-

ments, and so instructing the jury, as above stated and discussed.

6. By refusing to admit in evidence to the jury the settlement agreement between the Bank and Owen and Riley, which altered the rights of the parties to Jones' prejudice on the Owen and Riley notes, would rebut respondents' pleadings and impeach their testimony, and which refusal blindfolded the jury as to the true facts and relations between the parties. (Jones Exhibit 164 shown in the Appendix, *infra.*)

7. By instructing the jury that it could consider the Radtke Evaluation Report on the Nor-Tex and Jones oil leases (Jones Exhibit 64) as being only the opinion of its author, thus limiting the impeaching and rebuttal effect of the document and its general relevance, which report was paid for by Riley, delivered by him to Jones to induce Jones to sell to Rey-Tex, and supported the values Riley claimed as misrepresentations by Jones, but rebutted and contradicted the values Nor-Tex sought to establish by other "experts" at the trial.

8. By instructing the jury that it could only consider the other documents delivered to Jones by Riley (Jones Exhibits 47, 112A-G, 113, 113A, 144 and 148) as opinions of the authors, because they contained assertions about oil potentials and other matter which Riley testified were told him by Jones, and

were documents delivered by Riley to Jones to induce Jones to enter into the Nor-Tex agreements, thus admissible for rebuttal and impeachment and general relevance.

9. By submission of issues for the respondents to the jury in global terms as to any misrepresentation or omission, without specifying the fact inquired about, as above stated and discussed.

10. By refusing to submit to the jury any of the requested special issues of Jones, or any other issues or instructions on his defense theories of waiver, estoppel, ratification, election, scienter of respondents, or their *pari delicto* participation and guilt, as above stated and discussed.

11. In instructing the jury that Jones had violated the Securities Acts in all transactions unless they were exempt as non-public.

12. In refusing to submit issues or instructions to the jury on the relative knowledge and experience of the petitioner and respondents.

13. By commenting to the jury the respondents were not knowledgeable in the oil and gas business or its risks, and were unable to evaluate the risks without Jones supplying them a great amount of technical information.

14. In commenting to the jury that Jones and Owen were partners.

15. By instructing the jury that profit was usually the sole motive to invest in an undivided interest in land with oil potential or oil and gas leases.

16. By entering judgment for multiple recoveries in behalf of Owen in greater sums and for more relief than he was entitled to at law, and for which he had only pled alternatively, and without adjustment therefor on the balance of his purchase price which had never been paid.

17. By entering judgment over against Jones to Owen for the entire joint and several judgment awarded Riley against them, without deduction for the portion of Riley's purchase money that had been received and retained by Owen.

18. By refusal to correct any of the assigned errors, by either reversal or modification of the judgment, on motion for new trial or appeal.

These improper rulings and actions, it is respectfully submitted, cumulatively reflect a progressive breach of substantive and procedural rights due Jones which blindfolded the jury and prevented his presentation of a true picture of the relationship of the parties and the separate nature and origin of the three diverse actions he was forced to jointly defend. There

was a concerted plan to withhold clearly admissible evidence from the jury, and by improper limiting instructions remove the real impact and true relevance of other evidence admitted. The one-sided nature of the submission to the jury, both as to verbal instructions and nature of the issues, was almost tantamount to instruction of a verdict against Jones when considered with the errors that had occurred before, because it totally hid from the jurors his theories of defense. The improper comments of the trial court on the weight of the evidence in his charge, particularly with reference to lack of knowledge of the respondents, motive for investment and need for technical information not given, were distortions of even the case which had been disclosed by the evidence, and effectively removed any possibility of answers for Jones on the global questions submitted as to materiality and reliance on the unidentified misrepresentations and omissions to which they were related, or to the confusing and devious questions as to when the plaintiffs acquired knowledge.

Despite the rapidly expanding application of the anti-fraud provisions of the Securities Acts in civil actions in the lower federal courts, *S.E.C. vs. Ralston Purina Co.*, 346 U.S. 119 (1953); *S.E.C. vs. W. J. Howey Co., supra;* and *S.E.C. vs. C. M. Joiner Leasing Corp., supra;* have remained the definitive and controlling decisions of this Court relative to the underlying reasoning in determining the scope and availability of the protection afforded by the Acts. These

decisions, it is submitted, still recognize the tests of relative knowledge or access to knowledge, sophistication and need for protection, as being of prime importance, and this should be particularly true in efforts to apply the Acts in new areas and in isolated private transactions between only two contracting parties. It is further submitted that these tests were not adequately presented to the jury in the instant case, and that the trial court's comments removed even their inadequate presentation under the issues submitted.

This Court's insistence that the due process guarantee of the Fifth Amendment requires equal protection by laws enacted by Congress, that is, like application to all persons similarly situated without distinction, has already been demonstrated. *Schneider vs. Rusk, supra; Galvan vs. Press, supra.* Also the Court's recognition that such guarantee inhibits the taking of property from one for the benefit of another through complete departure from settled usages and modes of procedure in court proceedings. *Ochoa vs. Hernandez, supra.* Equally important and also applicable here are the prior decisions of this Court holding both Congressional acts and Federal administrative rulings will be construed and applied by the courts so as to afford to individuals all of the traditional safeguards of substantive and procedural due process guaranteed by the Constitution, unless language cannot be construed otherwise, it being assumed that both Congress and the Federal administrative

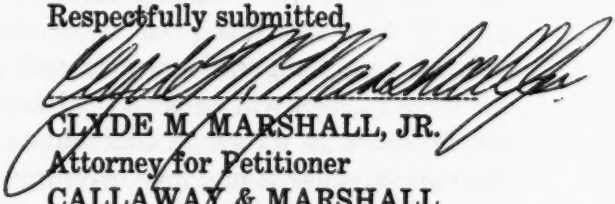
agencies intend to abide by the Constitution. *Greene vs. McElroy*, 360 U.S. 670 1959); *American Power & Light Co. vs. S.E.C.*, 320 U.S. 90 (1946).

The constructions and applications of the Federal Securities Acts and SEC rule 10b-5 which the trial court has made in the instant case, by the errors above enumerated, and their sanction by the Court of Appeals through its affirmance, it is submitted, are in direct conflict with these Supreme Court decisions, for which further reason certiorari should be granted here to correct the cumulative denial of fair trial and due process to this petitioner under the Securities Acts.

## CONCLUSION

For the reasons set forth above, it is respectfully submitted and prayed that a writ of certiorari should be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,



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## APPENDIX A

## OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 72-2707

NOR-TEX AGENCIES, INC. and W. E. RILEY,
Plaintiffs-Appellees,

versus

RICHARD M. JONES,
Defendant-Appellant,
CHARLES OWEN and CONTINENTAL
NATIONAL BANK OF FORT WORTH,
Defendants-Appellees.

*Appeal from the United States District Court for the Northern District of Texas*

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(July 26, 1973)

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Before AINSWORTH, GODBOLD and CLARK,
Circuit Judges.

AINSWORTH, Circuit Judge: The district court found the transactions here to involve securities sold through material misrepresentations, in violation of the anti-fraud provisions of federal securities laws, and ultimately awarded relief on various claims by plaintiff Nor-Tex Agencies, Inc. against defendant Richard M. Jones, by plaintiff W. E. Riley against defendants Jones and Charles Owen, and by cross-claimant Owen against defendant Jones, subject to rights of the Continental National Bank of Fort Worth as holder of notes issued by the claimants.

The facts, stated chronologically, begin in April 1967 when Jones approached Owen with the idea of purchasing a 420-acre tract of land in Bexar County, Texas, from Robert Maddox at a price of $260,000. Of interest to Owen were Jones's representations concerning oil and gravel deposits on the property. Owen and Jones together with another potential buyer, James Williford, looked at the property on April 23, 1967, and on this occasion Jones reaffirmed that the purchase price from Maddox was $260,000. On April 28, 1967, Jones told Owen that Maddox would hold the offer open another thirty days if they put up a total of $21,000 for an option. On May 1, 1967, Owen wrote a check to Jones for $14,000, representing his and Williford's share of the price for the option, and on the same day Jones wrote and mailed to Owen a letter confirming the terms of their verbal agreement. When Williford was unable to arrange financing for his share of the purchase price, Jones

suggested that Owen and Jones go ahead on a "fifty-fifty" basis. On May 31, 1967, Owen gave Jones a check for $36,333.33 and a promissory note for $79,-666.67, which with Owen's earlier check for $14,000 amounted to a total investment for Owen of $130,000. Jones and his wife took title to the property and then conveyed to Owen an undivided one-half interest in the surface, an undivided one-half interest in the mineral estate subject to an existing oil and gas lease covering the south 200 acres, and an undivided one-half interest in the existing lease entitling the owners to share a one-sixth royalty.

During the negotiations Jones warned Owen not to contact Maddox directly, because Jones had a special deal which could be ruined if Owen intervened. Furthermore, Jones said he made a sacrifice to enter the deal himself, because his wife had to sell her fur coat and Cadillac in order for Jones to raise his half of the money. However, when a deposition was taken in connection with this case on January 5, 1970, Owen learned that Jones actually purchased the property from Maddox for $125,000 instead of the $260,-000 represented to Owen.

In July of 1968 Jones met Riley and interested him in the Bexar County property. Jones subsequently telephoned Riley and arranged another meeting. At this next meeting Jones told Riley of plans to develop the oil resources with his "partner" Owen and that Riley could have one thirrd of their interest in the

420-acre tract for $100,000. A few days later Jones, Owen and Riley traveled in a private airplane to inspect the property. In addition to giving Riley a brochure outlining tax and financial prospects, Jones further assured Riley that his investment could be recovered within two years. Jones said he would purchase the outstanding production lease within six months and that there was a contract offer pending which would pay them $25,000 per year for gravel. Riley, during the return flight, gave his verbal commitment to invest, and Riley eventually paid Jones and Owen $56,222.22 cash and gave a promissory note for $43,777.78. Later, the outstanding lease was not acquired and the return for all three parties on the Bexar County property was negligible.

During the same airplane flight above referred to, Jones also discussed with Riley the possibility of embarking on a program of acquiring working interests in oil leases on other property. As worked out later, the basic plan was for a corporation, Nor-Tex, controlled by Riley to put up the money for drilling the wells. Jones itemized the cost of each well at about $32,000 for a complete well and $10,000 for a dry well. In return Nor-Tex would get 75 per cent of the working interest in the mineral lease, Jones would retain 25 per cent of the working interest, and Nor-Tex would reassign 25 per cent of the working interest to Jones after Nor-Tex received all of its money back for the drilling expenses. Jones assured Riley that the wells would not be "wildcats," but rather

holes in a "proven area," so that they could count on production of the maximum allowable twenty barrels per day for each well and sell the oil at $2 per barrel.

In September of 1968 Riley in his capacity as president of Nor-Tex signed the first agreements with Jones relating to wells to be drilled on what were called the Turner and Harris leases. To enable Jones to get started with the drilling, Nor-Tex borrowed money with Riley's personal guarantee and made several $50,000 advances to Jones.

Instead of $32,000, the cost to Jones of drilling a complete well was substantially less than that amount. Furthermore, several of the holes drilled were dry, and Jones's cost was substatntially less than the $10,-000 Nor-Tex agreed to pay.

Based on Jones's glowing reports, Riley decided sometime in December that Nor-Tex should go ahead with more commitments, Jones suggested they purchase two producing wells on the so-called Styles lease and drill three more wells. Riley closed the transaction on January 9, 1969 for Nor-Tex by agreeing to pay $20,000 for 75 per cent of the working interest in the two producing wells and to pay the usual price for Jones to drill additional wells. What Jones did not tell Riley was that Jones had acquired the Styles lease in early December for only $5,500.

Riley made a final commitment in February of 1969

for Nor-Tex to purchase 75 per cent of the working interest in ten producing wells on the Glenwood lease at a price of $110,000 and for Nor-Tex to pay Jones the usual price for additional wells. Jones failed to advise Riley that Jones acquired the lease for $46,000.

When it became evident that the wells were not producing according to Jones's representations, Nor-Tex brought this suit against Jones for rescission and compensatory damages on September 9, 1969, alleging that Jones induced Nor-Tex to buy securities through various misrepresentations in contravention *inter alia* of section 12(2)[1] of the Securities Act of 1933, 15

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[1] Section 12(2) reads as follows:

> Any person who—
>
> . . . .
>
> (2) offers or sells a security (whether or not exempted by the provisions of section 3, other than paragraph (2) of subsection (a) thereof), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission.
>
> shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security or for damages if he no longer owns the security.

U.S.C. § 771(2) (1970), and Securities and Exchange Commisssion Rule 10b-5,[a] 17 C.F.R. § 240.10b-5 (1972), promulgated under section 10(b)[a] of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1970). During the taking of a deposition on January 5, 1970, it became evident that Jones also defrauded Riley and Owen in the transactions relating

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[a] Rule 10b-5 reads as follows:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (1) To employ any device, scheme, or artifice to defraud,
>
> (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.
>
> in connection with the purchase or sale of any security.

[a] Section 10(b) reads as follows:

> Section 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national security exchange—
>
> . . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

to the Bexar County property, and the complaint was amended on June 30, 1970 to add Riley as a plaintiff and Owen and the Bank as defendants. Owen then filed a cross-complaint against Jones asking for $67,500 damages, representing the difference between the $130,000 Owen paid to Jones and the $62,000 (one half the price Jones paid Maddox) Owen should have paid Jones for a half interest.

Each claim herein presents a question cognizable under federal statutes and meets the $10,000 jurisdictional amount of 28 U.S.C. § 1331 (1970), *See also* Securities Act of 1933 § 22(a), 15 U.S.C. § 77v (a) (1970); Securities Exchange Act of 1934 § 27, 15 U.S.C. § 78aa (1970); *Kasner v. H. Hentz & Co.*, 5 Cir., 1973, ..... F. 2d ..... [No. 72-1575, March 15, 1973, p. 2]. We hold that Jones sold "securities," thus fulfilling a condition precedent to application of the anti-fraud provisions of the federal securities laws. *See* Securities Act of 1933 § 12(2); SEC Rule 10b-5. There is no doubt that Jones used the mails to perpetrate his scheme, thus satisfying another requirement of the anti-fraud provisions. *See* Securities Act of 1933 § 12(2); SEC Rule 10b-5.

At the close of the evidence, the district judge submitted to the jury under Rule 49(a) of the Federal Rules of Civil Procedure, numerous written special issues to determine whether Jones actually perpetrated fraud on each claimant. The jury found that Jones, for the purpose of inducing Owen to buy an

interest in the Bexar County property, made materially untrue statements of fact relied upon by Owen which Jones knew to be untrue, and which fraud Owen could not have discovered through the exercise of ordinary care until January 5, 1970, thereby causing Owen damages of $67,500. Rule 10b-5 forbids such making of "any untrue statement of a material fact" in connection with the sale of a security, and has been held to grant a private remedy for the amount of damages based on the difference between the price paid and fair market value of the security at the time of the transaction. *See generally* 2 A. Bromberg, Securities Law § 9.1, pp. 227-28 (1971); *J. R. Lewis, Inc. v. Newman*, 5 Cir., 1971, 446 F. 2d 800, 805. The district judge granted judgment in favor of Owen and against Jones for $67,500. To assure Owen's recovery, the district judge granted a lien and impressed a trust on Jones's interest in the Bexar County property, subject to the superseding claims of the Bank and Riley. The jury found that Jones made his offers to Riley and Nor-Tex (through Riley) by means of a prospectus or oral communication which included untrue statements of material facts which Jones knew to be false, and that Riley relied upon the statement and could not have known by the exercise of reasonable care about such untruths until July 3, 1969, thus entitling plaintiffs to the standard remedy of rescission on all their transactions with Jones for his violation of section 12(2). The jury additionally found that Jones's false statements to Riley in connection with the Bexar County prop-

erty were not made with the authorization or knowledge of Owen but were made within the purposes of the joint venture of Jones and Owen. In the judgment Owen was vicariously held liable with Jones to grant Riley rescission.

Jones raises eighteen points of error on this appeal. All of these points of error have been considered by us following a thorough study of the record and with the benefit of extensive briefs and oral argument. None of these points warrants modification of the judgment. Only the following points are discussed below.

I.

At issue initially is the question whether Jones sold a "security" in each of the transactions. *See generally* L. Loss, Securities Regulation 469-96 (1961), Supplement 2495-2509 (1969). According to his brief, "Appellant still insists that the Bexar County sales did not involve securities . . . Irrespective of the answer to this issue, however, he respectfully submits that the evidence conclusively shows that all of the transactions, both Bexar County and Nor-Tex leases, were isolated intrastate contracts, made by private negotiations, without advertisement or public offer, between Texas residents only, with each purchaser being equal or superior to Jones as to business experience, knowledge or access thereto, and ability to fend for self without need for protection of the se-

curities acts, so that such transactions would be exempt, as a matter of law . . ."

Section 2(1) of the Securities Act of 1933, *as amended*, 15 U.S.C. § 77b(1) (1970) defines a "security" as "any note, stock . . . certificate of interest or participation in any profit-sharing agreement, . . . investment contract, . . . fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a 'security'." *See also* Securities Exchange Act of 1934 § 3(a)(10), 15 U.S.C. § 78c(a)(10) (1970). The term "security" must be given a broad and flexible construction so that the remedial purpose of the anti-fraud provisions will be effectuated. *See Tcherepnin v. Knight*, 389 U.S. 332, 336, 88 S.Ct. 548, 553 (1967); *Herpich v. Wallace*, 5 Cir., 1970, 430 F. 2d 792, 802; *Rekant v. Dresser*, 5 Cir. 1970, 425 F. 2d 872, 878.

Owen, Riley, and Nor-Tex were induced by Jones to speculate in fractional undivided oil and gas interests, and were led to expect profit from Jones's efforts. At the time of his purchase Owen obtained the right to receive an undivided one-half interest of a one-sixth royalty interest existing on the Bexar County property. By his later purchase Riley obtained an undivided one-third interest in the same one-sixth royalty. Each of Nor-Tex's contracts provided for the acquisition of part of a working interest in the oil lease, and the wells were already pro-

ducing or to be drilled by Jones. Accordingly, the contracts were securities within the contemplation of the federal securities laws. *See generally Securities and Exchange Commission v. C. M. Joiner Leasing Corp.*, 320 U.S. 344, 64 S.Ct. 120 (1943); *Graham v. Clark*, 6 Cir., 1964, 332 F. 2d 155; *Moses vs. Michael*, 5 Cir., 1961, 292 F. 2d 614, 618-19.

Furthermore, we find that Owen, Riley and Nor-Tex made "investment contracts" with Jones which were securities within the contemplation of the federal securities laws. *See generally Securities and Exchange Commission v. MacElvain*, 5 Cir., 1969, 417 F. 2d 1134, 1136-37, *cert. denied*, 397 U.S. 972, 90 S.Ct. 1087 (1970); *Lynn v. Caraway*, 5 Cir., 1967, 379 F. 2d 943, *cert. denied*, 393 U.S. 951, 89 S.Ct. 373 (1968); *Roe v. United States*, 5 Cir., 1961, 287 F. 2d 435, *cert. denied*, 368 U.S. 824, 82 S.Ct. 43 (1961), *on appeal after remand*, 5 Cir., 1963, 316 F. 2d 617, 620. Thus, the district judge posed a special issue to the jury whether or not plaintiff Riley's transaction with defendants Jones and Owen was an investment contract. An investment contract was defined by the trial judge in instructions to the jury on the basis of the Supreme Court decision in *Securities and Exchange Commission v. W. J. Howey Co.*, 398 U.S. 293, 298-99, 66 S.Ct. 1100, 1103 (1946), as follows:

> You are instructed that an investment contract is a contract, transaction or scheme whereby a

> person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party. In an investment contract the investor provides capital and shares in the earnings and profits; others manage, control and operate the enterprise.

The jury answered affirmatively that the transaction was an investment contract. This conclusion was fully supported by the evidence. Riley contributed the investment capital and depended on Jones to manage the enterprise and develop a profit through his expertise in the oil and gas field. The terms and purpose of Owen's contract with Jones were essentially the same as Riley's contract with Jones and Owen. Nor-Tex's contracts with Jones expressly depended upon Jones to drill the oil wells with Nor-Tex's capital investment.

The jury finding that Owen and Jones were joint venturers was not inconsistent with the fact that this was an investment contract in which Jones was expected to take the initiative in any development of the enterprise. It was anticipated that Owen would remain comparatively passive. *See generally* R. Jennings & H. Marsh, Securities Regulation 308 - 09 (1972) (for a discussion of joint venture and partnership interests as securities).

We do not understand the relevance of appellant's contentions that all the transactions were isolated in-

trastate contracts engaged in without a public offer by purchasers with equal or superior business experience to Jones. As this Court said in *Stier v. Smith*, 5 Cir., 1973, 473 F. 2d 1205, 1207, "sophisticated investors, like all others, are entitled to the truth." See also *Lehigh Valley Trust Co. v. Central National Bank of Jacksonville*, 5 Cir., 1969, 409 F. 2d 989, 992. Moreover, here neither Owen nor Riley had extensive oil and gas experience prior to their transactions with Jones, who had superior knowledge of the particular transactions involved in this case. The jury found that public offers were made by Jones. However, even if the transactions were isolated intrastate contracts made pursuant to private offers, the sales of securities were still subject to the anti-fraud provisions of the federal securities acts. *See generally Hill York Corp. v. American International Franchises, Inc.*, 5 Cir., 1971, 448 F. 2d 680, 695; 1 Bromberg, *supra*, § 4.6, p. 82.

Thus section 3(a)(11) of the Securities Act of 1933, 15 U.S.C. § 77c(a)(11) (1970) states the so-called intrastate exemption as follows: "Except as hereinafter provided, the provisions of this subchapter shall not apply to any of the following classes of securities: . . . [a]ny security which is part of an issue offered and sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within or, if a corporation incorporated by and doing business within, such State or Territory." But the anti-

fraud provision of section 12(2) is expressly applicable without regard to whether the security falls within the exemption of section 3(a)(11). Likewise, Rule 10b-5 of the '34 act is not subject to the intrastate exemption stated in the '33 act. *See* Securities Exchange Act of 1934 § 3(a)(1), 15 U.S.C. § 78c(a)(12) (1970); 2 Bromberg, *supra*, § 4.6, p. 82 (1971).

The so-called private offer exemption of section 4(2) of the Securities Act of 1933, 15 U.S.C. § 77(d)(2) states: "The provisions of section 5 shall not apply to . . . transactions by an issuer not involving any public offering." By its express terms, the private offer exemption only exempts a transaction from the registration requirements of sections 5, 15 U.S.C. § 77(e) (1970), and 12(1), 15 U.S.C. § 77(1)(1) (1970), and does not exempt a transaction from the anti-fraud provisions of sections 12(2) of the '33 act or Rule 10b-5 under the '34 act.

II.

The second major issue in this case concerns the district judge's approval of Nor-Tex's amended complaint which added Riley as a plaintiff and Owen and the Bank as defendants, followed by Owen's filing a cross-complaint against Jones. In the trial below, Jones moved to sever the Nor-Tex action for a separate trial, but the district judge denied the motion. On appeal Jones objects to Riley being in this case, because Riley was allegedly an "intervening stranger"

who sought recovery on an "unrelated cause of action in which Nor-Tex had no interest."

The addition of Riley was permissible under Rule 20(a), Federal Rules of Civil Procedure, because his claim arose from the same series of occurrences as Nor-Tex's claim, and the claims presented common questions of law and fact. Both Nor-Tex's and Riley's claims were based on a series of false statements made by Jones, such as were made on the day Jones flew with Riley and Owen to inspect the Bexar County property. Both claims present common questions of law concerning the definition of a security and common questions of fact whether Jones statements were false.

The district judge acted within his discretion in allowing the joinder under Rule 20(a), as well as denying the motion for severance under Rule 20(b). *See also* Rules 13, 42, Fed.R.Civ.P. As noted above, Jones's scheme to defraud Nor-Tex was only one chapter in a larger plot to also defraud Riley and Owen. The defendant was not prejudiced by the addition of Riley and Owen, because testimony about them was unavoidable in the Nor-Tex action. In dealing with Nor-Tex, Jones negotiated with Riley. Nor-Tex's transactions stemmed from Riley's flight with Owen and Jones to the Bexar County property, so the facts concerning Nor-Tex were inextricably woven together with the facts concerning Owen and Riley.

Appellant relies upon *Dupont v. Southern Pacific Company*, 5 Cir., 1966, 366 F. 2d 193, *cert. denied*, 386 U.S. 958, 87 S.Ct. 1027 (1967), where the district judge consolidated the cases of four plaintiffs who had differing theories of recovery and ordered the designation of a lead counsel for all four plaintiffs. Because of the resulting confusion and because the consolidation created a conflict of interest for the lead counsel, we reversed and remanded for severance and new trials. Unlike *Dupont*, here the consolidation did not deprive Riley of effective assistance of counsel or require him to present inconsistent theories. His defensive stance would have been the same even if the claims were tried separately. The fairest and most expeditious way to dispose of these claims was to try them together.

III.

In his answers to the amended complaint and to the cross-claim, Jones filed counterclaims against Riley and Owen to collect on overdue notes given in connection with the Bexar County property. Because the notes were in default, Jones sought to accelerate the maturity and foreclose on the security, which was the interest Riley and Owen had each purchased in the property. Named as voluntary or involuntary plaintiff, "whichever it shall elect," was the Bank to which the notes had subsequently been pledged.

The Bank moved to dismiss the counterclaims, and

the district judge correctly granted the motion. According to the express terms of the pledge agreement the Bank was granted "possession and custody of the Collateral [the notes] until the Obligations are fully paid," thereby precluding Jones from foreclosing.[4]

---

[4] Jones nevertheless contends on appeal that a "pledgee has a duty of reasonable diligence to collect on the pledged note, and certainly has a duty to seek recovery when the maker of the note institutes suit to cancel same, joining both pledgor and pledgee." Appellant cites the following Texas authorities in support of his contention: 46 Tex. Jur. 2d § 8, p. 202 *et seq.*; Liner v. L. B. Watkins Land Mtge. Co., 68 S.W. 311 (Tex. Civ. App. 1902); and Wise v. Cecil, 135 S.W. 2d 235 (Tex. Civ. App. 1939).

The *Texas Jurisprudence* text at pages 207 and 208 establishes the proposition that the pledgee is bound to take certain measures for the collection of the sum due from the maker. *Liner* is cited at 46 Tex. Jur. 2d at 203 n. 7 for the proposition that the pledgor may also sue but that the pledgee should be joined as a party. Neither of these authorities is apposite here in that the parties varied the general rules on the pledgee's duty by stipulating that the "Bank . . . will not have any duty to take steps to preserve rights against prior parties or enforce collection of collateral by legal proceedings or otherwise. Bank's sole duty being to use only reasonable care in the custody and physical preservation of the collateral in the Bank's possession." *Wise* is cited at 46 Tex. Jur. 2d at 206 n. 6 for the proposition that it is the duty of the pledgee to protect pledgor to the extent that security shall not be sacrificed, such as in the event of some bankruptcy proceeding. The Bank's action here could not have helped Jones since the claims of rescission by Riley and damages by Owen depended upon Jones's fraud at the inception of the original transactions. The claims against Jones could not be affected by later inaction of the Bank.

**Under the circumstances, the contentions of Jones are without merit and the judgment appealed from is AFFIRMED.**

## APPENDIX B

## JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH DIVISION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

NOR-TEX AGENCY, INC., and
W. E. RILEY,

Plaintiffs

VS. CIVIL ACTION NO. CA-4-1298

RICHARD M. JONES, CHARLES
OWEN, and CONTINENTAL NATIONAL
BANK OF FORT WORTH,

Defendants

JUDGMENT

This action came on for trial on the 16th day of November, 1971, before a court and a jury, Honorable Robert M. Hill, United States District Judge,

presiding, and came W. E. RILEY and NOR-TEX AGENCY, INC., Plaintiffs, in person, and by and through their attorneys of record, and Defendant and Cross-Plaintiff CHARLES OWEN, in person and by and through his attorneys of record, and Defendant RICHARD M. JONES, in person and by and through his attorney of record, and the CONTINENTAL NATIONAL BANK OF FORT WORTH, by its attorney of record, and the Court having instructed the jury to find a verdict based upon general instructions and also to make answer to certain questions, and the jury having duly rendered a verdict and having made answer to such questions;

IT IS SO ORDERED, ADJUDGED, AND DECREED that the sale of the undivided one-third interest in and to the following described property on or about the 29th day of July, 1968, as evidenced by the deed dated June 1, 1968, and recorded in Volume 6011, page 677, of the Deed Records of Bexar County, Texas, executed by the Defendants Charles Owen and Richard M. Jones, as grantors, to the Plaintiff W. E. Riley as grantee, be, and the same is hereby cancelled and rescinded, to-wit:

> Lying and situated in Bexar County, Texas, on the waters of the Leon Creek being a part of the Fernando Rodriquez Grant, and being a portion of subdivision No. Three of the division among the heirs of Asa Mitchell, and being a portion of that deeded to Asa J. Mitchell by the executors

of the estate of Asa Mitchell, and including that portion conveyed to Nathan Underwood by W. C. McKean, Jr., and that portion conveyed by H. K. McKean to Nathan Underwood, said land being further described by metes and bounds as follows:

BEGINNING at the Northeast corner of said original subdivision No. 3;

THENCE South 84 degrees West 1400 varas to the Northwest corner of said subdivision No. 3;

THENCE South 26 degrees West with the West boundary line of said subdivision a sufficient distance that a line run at right angles to the west boundary line, to the East boundary line, and

THENCE with the East boundary line to the place of beginning, will include 420 acres; and

THENCE from said point on said west boundary line at right angles therefrom to the east boundary line of said subdivision No. 3;

THENCE with said East boundary line to the place of beginning, and containing 420 acres, more or less;

together with the undivided one-third interest in the mineral estate to the property hereinabove

described which is subject to an existing oil and gas lease covering the south 200 acres, which oil and gas lease reserves 1/6th royalty to the lessor and which 1/6th royalty interest was owned by the grantors therein and an undivided one-third thereof was conveyed by said grantors Charles Owen and Richard M. Jones to the grantee W. E. Riley.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that by virtue of such rescission Plaintiff W. E. Riley is awarded judgment against Defendants Charles Owen and Richard M. Jones and shall recover from them, jointly and severally, the sum of $81,763.77, together with interest on $68,662.55 at the rate of six percent per annum from December 1, 1971, until paid.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the promissory note dated June 1, 1968, executed by the Plaintiff W. E. Riley, payable to the order of the Defendants Charles Owen and Richard M. Jones in the original principal amount of $43,777.78, is hereby cancelled and rescinded and is held to be null and void and of no further force or effect as to said Defendants, and that Plaintiff W. E. Riley shall not be obligated to said Defendants Charles Owen and Richard M. Jones, or either of them thereby or thereunder, but it is also ORDERED and DECREED that the cancellation and rescission of the said note shall not in any manner affect the rights

of the Continental National Bank of Fort Worth, a holder in due course of such note, and of the collateral securing the same; and in this connection,

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Plaintiff W. E. Riley is granted a judgment over and against the Defendants Charles Owen and Richard M. Jones, jointly and severally, for any sums of money, if any, hereafter paid by said Plaintiff W. E. Riley on the above-described note presently held by the Continental National Bank of Fort Worth, Texas.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that title and possession of the undivided one-third interest in and to the above-described property in Bexar County, Texas, which was conveyed to the Plaintiff W. E. Riley by the Defendants Charles Owen and Richard M. Jones, be divested from the said Plaintiff W. E. Riley and shall be vested in the Defendants Charles Owen and Richard M. Jones, subject to the lien in favor of Plaintiff W. E. Riley as hereinafter provided for in this judgment.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Plaintiff W. E. Riley does have, and he is hereby vested with a lien on the same one-third undivided interest in the above-described property in Bexar County, Texas, that was conveyed to him by the said Defendants Charles Owen and Richard M. Jones, to secure the payment of said sum of $81,763.-

77, together with interest, jointly and severally adjudged against Defendants Charles Owen and Richard M. Jones as hereinabove provided; and that such lien shall be first and superior to all rights, titles, and interests of every kind and character of the Defendants Charles Owen and Richard M. Jones, and their heirs, legal representatives, successors, and assigns, save and except, however, the rights of the Continental National Bank of Fort Worth, Texas, as above provided.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Plaintiff W. E. Riley have foreclosure of the lien provided for above on and against the one-third interest in the above-described property in Bexar County, Texas, which he acquired from the Defendants Richard M. Jones and Charles Owen, and that an Order of Sale shall issue to the United States Marshal, directing him to seize and sell such undivided one-third interest in the above-described property the same as under execution in satisfaction of the judgment in favor of Plaintiff W. E. Riley against the Defendants Charles Owen and Richard M. Jones as set out in the preceding portions of this judgment; and if the above-described undivided one-third interest shall sell for more than a sufficient sum to pay off and satisfy such sum of money due Plaintiff W. E. Riley from the Defendants Charles Owen and Richard M. Jones, then the officer is hereby directed to pay same to the Defendant Charles Owen.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Defendant Charles Owen is awarded judgment upon his cross-claim against the Defendant Richard M. Jones for the sum of $67,500.00, plus interest thereon at the rate of six percent per year from this date.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that subject to the rights and liens of the Continental National Bank of Fort Worth, and the lien of the Plaintiff W. E. Riley, as provided above, Defendant Charles Owen does have and he is vested with a lien on the undivided one-half interest owned by the Defendant Richard M. Jones in the entire tract of land in Bexar County, Texas, described above, to secure the judgment for $67,500 recovered by the Defendant Charles Owen against Defendant Richard M. Jones as hereinabove provided; and that such lien covers all of the interest of the Defendant Richard M. Jones in said property and is superior to all rights, title, and interest of Defendant Richard M. Jones, his heirs, assigns, and legal representatives, save and except, however, the rights and liens of the Plaintiff W. E. Riley as hereinabove provided; and the rights and lien of the Continental National Bank of Fort Worth, Texas.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Defendant Charles Owen have foreclosure of the lien provided for above on and against the undivided one-half interest in the above-described

property in Bexar County, Texas, which Defendant Richard M. Jones retained as his undivided one-half interest in such property at the time the said Defendant Richard M. Jones conveyed the undivided one-half interest in such property to Defendant Charles Owen, and that an order of sale shall issue to the United States Marshal, directing him to seize and sell such property, the same as under execution in satisfaction of the judgment in favor of Defendant Charles Owen as above provided.

IT IS ORDERED, ADJUDGED, and DECREED that the following agreements by and between the Plaintiff Nor-Tex Agency, Inc., and the Defendant Richard M. Jones, and the following assignments and conveyances from Defendant Richard M. Jones to Plaintiff Nor-Tex Agency, Inc., are hereby cancelled and rescinded and held to be null and void and of no force and effect, and all obligations of the Plaintiff Nor-Tex Agency, Inc., to the Defendant Richard M. Jones as provided for therein are held to be and they are void and unenforceable:

1. The letter agreement dated September 12, 1968, signed by the Defendant Richard M. Jones, addressed to the Plaintiff Nor-Tex Agency, Inc., approved and accepted by Nor-Tex Agency, Inc., by W. E. Riley, president, pertaining to the assignment of a working interest therein described in the two oil and gas leases described in Exhibit "A" thereto attached, said leases

being known as the Turner lease and the Harris lease, both covering lands in Guadalupe County, Texas.

2. The letter agreement dated September 12, 1968, addressed to Nor-Tex Agency, Inc., and signed by the Defendant Richard M. Jones, addressed to the Plaintiff Nor-Tex Agency, Inc., approved and accepted by Nor-Tex Agency, Inc., by W. E. Riley, president, pertaining to the assignment of a working interest therein described in the oil and gas lease described in Exhibit "A" thereto attached, said lease being known as the H. G. Cartwright lease, covering land in Caldwell County, Texas.

3. The letter agreement dated January 8, 1969, signed by the Defendant Richard M. Jones, addressed to the Plaintiff Nor-Tex Agency, Inc., approved and accepted by Nor-Tex Agency, Inc., by W. E. Riley, president, pertaining to the assignment of a working interest therein described in the oil and gas leases described in Exhibit "A" thereto attached, said leases being known as the Styles lease and the Styles "A" lease, both covering lands in Caldwell County, Texas.

4. The letter agreement dated February 24, 1969, signed by the Defendant Richard M. Jones, addressed to the Plaintiff Nor-Tex Agency, Inc., approved and accepted by Nor-Tex Agency, Inc., by W. E. Riley, president, pertaining to the assignment of a working interest therein described in said oil and gas leases described in Exhibit "A" thereto attached, said leases

being known as the Gus Hardy lease covering lands in Caldwell County, Texas, and the Zoboroski lease, the Zoboroski "A" lease, the A. Mandell lease, the Eddie Jahns lease, the Anna Jahns lease, and the Joseph Gatzke lease, all covering lands in Guadalupe County, Texas, and being the same leases acquired by Richard M. Jones from Glenwood-Warnecke, et al, by assignments recorded as to the Hardy lease in the records of Caldwell County, Texas, and as to the other leases in the records of Guadalupe County, Texas.

5. Assignment of oil and gas leases dated September 12, 1968, from Richard M. Jones, as assignor, to Nor-Tex Agency, Inc., as assignee, recorded in Volume 413, pages 136-139, of the Deed Records of Guadalupe County, Texas, covering an interest therein described in and to the following:

*Turner Lease:*

Oil and Gas Mining Lease dated January 31, 1956, between Jesse Turner, Jr. and wife, Isabel Turner, Geraldine Brawner and husband, Joe A. Brawner, as Lessor and T. R. Boger, Jr., as Lessee, recorded in Volume 296, pages 70-72 of the Deed Records of Guadalupe County, Texas, covering 188 acres of land, more or less, in the Samuel Highsmith League in Guadalupe County, Texas, BUT ONLY INSOFAR as the same covers the following described land, to-wit:

The same being 40 acres of land and a part of the 50 acres tract released by Glenwood Warncke to C. B. Streety d/b/a M-Five Oil Co., and a part of the Samuel Highsmith League, Guadalupe County, Texas, and said 40 acres of land leased herein described as follows:

BEGINNING at a stake set for the Northwest corner of this tract, the same being the common corner between the Turner and Tom Baker tracts of land;

THENCE South 18-28 East 1202.7 feet to iron pipe set for Northeast corner of this tract;

THENCE South 50-24 West 1355.7 feet to iron pipe set for Southeast corner of this tract;

THENCE North 39-36 West 1118.0 feet to iron pipe set in the line of a county road for southwest corner of this tract;

THENCE North 50-24 East along said county road 1799.1 feet to place of beginning and containing 40.55 acres of land, more or less, according to a survey made on the ground July 30, 1967, by H. S. Bettersworth, Seguin, Texas, State Licensed Land Surveyor.

*Harris Lease:*

Oil and Gas Lease dated January 11, 1968, between C. Thompson Harris and wife, Anna R. Harris, as Lessor, and J. Kenneth Blackmar, as Lessee, recorded in Volume 405, pages 176-8 of Deed Records of Guadalupe County, Texas, covering two tracts of land containing 41 acres of land, more or less, out of the H. R. Hunt Survey, Guadalupe County, Texas, therein described.

6. Assignment of oil and gas lease dated September 12, 1968, from Richard M. Jones as assignor, to Nor-Tex Agency, Inc., as assignee, recorded in Volume 328, page 363 of the Deed Records of Caldwell County, Texas, covering an interest therein described in and to the following:

*Cartwright Lease:*

Oil and Gas Lease dated May 9, 1960, between Harry G. Cartwright, et al, as Lessor, and E. S. Smith and Vivian Mooney, as Lessee, recorded in Volume 283, page 478 of the Deed Records of Caldwell County, Texas, covering 40 acres of land, more or less, out of the George C. Kimble Survey, Caldwell County, Texas, SAVE AND EXCEPT the right-of-way for the new Luling and San Marcos Road, estimated to leave herein about 37 acres, LESS AND EXCEPT, however, five (5) acres out of the Northwest corner of the above-mentioned 37 acre tract of land as shown by Assignment from Lester Foran, Trustee, to R.

M. Jones, which said Assignment bears date of August 28, 1968, and is duly recorded in Volume 328, page 22 of the Deed Records of Caldwell County, Texas, reference to which is here made for a more particular description of said five acres.

7. Two asignments of oil and gas leases both dated January 9, 1969, from Richard M. Jones as assignor, to Nor-Tex Agency, Inc., as assignee, one being recorded in Volume 330,, page 161 of the Deed Records of Caldwell County, Texas, and the other being recorded in Volume 330, page 161 of the Deed Records of Caldwell County, Texas, covering interests therein described in and to the following:

*Styles Lease:*

Being 66.3 acres of land, more or less, out of the M. G. Dykes 3/4 League in Caldwell County, Texas, more particularly described in an oil and gas mining lease made and entered into on August 13, 1963, by and between Allie Rowlett, et al, as Lessors, and J. N. Brigance, as Lessee, which is recorded in Volume 199, page 158 of the Deed Records of Caldwell County, Texas;

Being 22.7 acre of land, more or less, out of the M. G. Dykes League in Caldwell County, Texas, more particularly described in four oil and gas mining leases:

1. One made and entered into by and between Allie Rowlett, et al, as Lessors, and J. N. Brigance, as Lessee, on March 19, 1963, as shown of record in Volume 297, page 120 of the Deed Records of Caldwell County, Texas;

2. One made and entered into by and between Louis Benbow, et al, as Lessors, and J. N. Brigance, as Lessee, on April 26, 1963, as shown of record in Volume 297, page 454, of the Deed Records of Caldwell County, Texas;

3. One made and entered into by and between H. M. Ainsworth, Sr., et al, as Lessor, and J. N. Brigance, as Lessee, on April 26, 1963, as shown of record in Volume 297, page 412, of the Deed Records of Caldwell County, Texas;

4. One made and entered into by and between Erkle Henry, et al, as Lessors, and Ray E. Bailey, as Lessee, on May 5, 1963, as shown of record in Volume 297, page 415, of the Deed Records of Caldwell County, Texas;

all to which reference is here made for a more particular description of such land.

8. All assignments from Richard M. Jones to Nor-Tex Agency, Inc., of any interest in and to oil and gas lease dated November 8, 1954, from Gus L. Hardy, et al, lessors, to Luling Oil and Gas Company, Inc.,

as lessee, recorded in Volume 256, page 494, Deed Records of Caldwell County, Texas, covering the following-described land:

*Hardy Lease:*

Lying and being situated in Caldwell County, Texas, being a part of the Spencer Morris League and described in four (4) tracts as follows:

*FIRST TRACT:* BEGINNING at the SW corner of the G. Hinds League, at pile of rock from which a PO 12 in. in diameter marked X bears S 68 W 6-3-4 vrs. another same mark X bears N 18 W 11-1/2 varas;

THENCE East 790 varas to pile of rocks on said Hinds South line from which a PO 12 inches in diameter bears N 52 W 7 varas, another 10 inches in diameter marked blaze and chops bears S 40 W 8-1/2 varas;

THENCE 30 W 1650 varas to L. Barnetts NE corner;

THENCE N 60 W with said Barnetts line 1160 varas to the SW corner of this survey;

THENCE N 30 E 1125 varas to pile of rocks on the Plum Creek Bridge Road;

THENCE along said road 512 varas to place of beginning containing 300 acres of land, more or less.

*SECOND TRACT:* A part of the Spencer Morris League and beginning at a rock set on the NW line of said League and set for the most West corner of a 350 acre tract of land conveyed by Mrs. Elizabeth Wood to Len Barnett;

THENCE S 60 E with the SW line of said 350 acre tract 439 varas to a pile of stone from which a PO 12 inches in diameter marked X bears S 15-1/2 W 5 varas;

THENCE N 8-1/2 E 911 varas to a rock set on the SW line of the J. K. Moore tract of land from which a PO 12 inches in diameter marked X bears S 60 E 7 varas;

THENCE N 60 W with the SW line of said tract 103 varas to a stake set on the Spencer Morris League and made for the North corner of this tract;

THENCE S 30 W 846 varas to the place of beginning; containing 40.6 acres of land.

*THIRD TRACT:* Fifteen (15) acres out of the Chapman Pasture just East of the Len Barnett old homestead, BEGINNING at stake S 30 W

5523-1/2 feet from a pile of rock in the Luling-Soda Springs Road and being the SE corner of the G. Hinds League and from which a PO bears S 28 W 8th feet;

THENCE S 71-1/2 E 640 feet to a corner from which a large LO in creek bears 16-1/2 E 57-1/2 feet;

THENCE N 30 E 1043-1/3 feet to corner;

THENCE N 71-1/2 W 640 feet to West line of Mrs. Johnson tract;

THENCE with said line S 30 W 1043-1/3 feet to place of beginning;

*FOURTH TRACT:* Being a part of the Spencer Morris League in Caldwell County, Texas, and being Blocks Nos. Nine (9), Ten (10), Twenty-Three (23) and Twenty-Four (24) in the T. W. Pierce's Addition to the City of Luling, according to the plat or map of said addition.

THERE IS EXCEPTED HEREFROM the Southwest 4 acres of said fifteen (15) acres tract conveyed by A. B. Jackson et ux to the City of Luling in deed dated July 18, 1939, recorded in Volume 193 at page 162 of the Deed Records of Caldwell County, Texas, together with the oil, gas, and other minerals in and under said 4 acres

which were reserved by the grantors in such deed and THERE IS FURTHER EXCEPTED HEREFROM that portion of the 40.6 acres included in the deed from A. B. Jackson, et ux to W. A. Seay et ux dated January 31, 1927, recorded in Volume 209 at page 569 of the Deed Records of Caldwell County, Texas, and LESS AND EXCEPT one-fourth (1/4) of an acre of land, more or less, out of said Pierce Block as conveyed by A. B. Jackson et ux to W. A. Seay by deed dated January 31, 1927, recorded in Volume 209 at page 569 of the Caldwell County Deed Records, leaving contained herein 352 acres of land, more or less.

EXCEPTING ALSO the one-sixteenth (1/16th) non-participating oil, gas, and other mineral interest reserved by Elizabeth Sellers Hardy et al in their deed to International Resources, Inc., dated February 23, 1966.

9. Assignment of oil and gas leases dated May 1, 1968, from Richard M. Jones as assignor to Nor-Tex Agency, Inc., as assignee, recorded in Volume 413, page 136 of the Deed Records of Guadalupe County, Texas, covering an interest therein described in and to the following:

*Gatzke Lease:*

Oil and gas lease dated Feebruary 6, 1964, recorded in Volume 363, pages 257-9 of the Deed Records of Guadalupe County, Texas, executed by Joseph Gatzke and wife, Elsie Gatzke as lessors, to Joe Blalack, lessee, covering 188 acres of land, more or less, out of the J. D. Clements League No. 14, more particularly described therein.

*A. Mandel Lease:*

Oil and gas lease dated February 27, 1968, recorded in Volume 407, pages 260-1 of the Deed Records of Guadalupe County, Texas, executed by Anton Mandel, et ux, as lessors to Eddie Jahns, lessee, covering 40 acres of land therein described, situated in Guadalupe County, Texas.

*Eddie Jahns Lease:*

Oil and gas lease dated May 29, 1959, recorded in Volume 324, pages 191-3 of the Deed Records of Guadalupe County, Texas, executed by Eddie Jahns, et ux, as lessors, to John Paul Massart, Trustee, lessee, covering three tracts of land in Guadalupe County, Texas, a portion of the Joe De Baume and Jessie K. Davis Surveys, the first tract containing 52 acres of land, the second tract 3.1 acres of land, and the third tract 6.2 acres of land, all more particularly described in said oil and gas lease.

*Anna Jahns Lease:*

Oil and gas lease dated January 31, 1967, recorded in Volume 400, pages 202-4 of the Deed Records of Guadalupe County, Texas, executed by B. B. Schraub as lessor, to Glenwood-Wornecke, lessee, covering 150 acre tract of land, a part of the Jessie K. Davis one-fourth, Guadalupe County, Texas, less and except, however, a 50-acre tract therein described, said tract of land covered by said lease being fully described therein by metes and bounds and being here referred to and made a part hereof for all purposes.

*Fred Zoboroski Lease:*

Oil and gas lease dated May 8, 1968, recorded in Volume 397, pages 580-87 of the Deed Records of Guadalupe County, Texas, executed by Moneka Zoboroski, a widow, and Fred Zoboroski and wife, Clara Zoboroski, as lessors, to Glenwood-Warnecke, lessee, covering 250 acres of land out of the J. D. Clements League No. 14 described in two tracts which oil and gas lease and the record thereof reference is made herein for a full and complete description of the property covered thereby.

*Zoboroski "A" Lease:*

Oil and gas lease dated May 1, 1969, executed by Moneka Zoboroski, a widow, and Fred Zoboroski and wife Clara Zoboroski, as lessors, to Glenwood-Warnecke, lessee, recorded in Volume 419, pages 409 of the Deed Records of Guadalupe County, Texas, covering 247 acres out of the 297 acres of land, out of the J. D. Clements League No. 14, said two tracts of land being described by metes and bounds therein, said oil and gas lease being here referred to and made a part hereof.

10. The note dated May 1, 1969, executed by Nor-Tex Agency, Inc., payable to the order of Seguin Pipe & Supply Co., in the principal amount of $80,-000, bearing interest at the rate of 7% per annum and payable in monthly installments of principal and interest, each in the amount of $1,584.08, being the same note executed and delivered by Nor-Tex Agency, Inc., as part payment of the purchase price for the interests in the Hardy lease, Caldwell County, Texas, the Mandel lease, the Gatzke lease, the Eddie Jahns lease, the Anna Jahns lease, the Zoboroski lease, and the Zoboroski "A" lease which were assigned to Nor-Tex Agency, Inc., by Richard M. Jones.

11. The deed of trust dated May 1, 1969, executed by Nor-Tex Agency, Inc., to Robert T. Ryan, Jr., Trustee, for the benefit of the Seguin Pipe & Supply Co., covering the interest acquired by Nor-Tex Agency, Inc., in the oil and gas leases mentioned in 9 above,

which deed of trust was given to secure the payment of the $80,000 note which is described in 10 above.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the Plaintiff Nor-Tex Agency, Inc., recover from the Defendant Richard M. Jones the sum of $356,981.64, with interest on $336,000.00 at the rate of six percent per annum from December 1, 1971, until paid, and that to secure the payment thereof.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that title to the undivided interests in the oil and gas leases and the oil wells situated thereon, and the pipe, tubing, rods, tanks, separators, pumping equipment, and other personal property situated thereon or used in connection with said leases acquired by the Plaintiff Nor-Tex Agency, Inc., from the Defendant Richard M. Jones, pursuant to the above-mentioned letter agreements, and by virtue of the assignments described above, be, and the same is hereby divested from the Plaintiff Nor-Tex Agency, Inc., and shall be vested in the Defendant Richard M. Jones, subject to the lien in favor of the Plaintiff Nor-Tex Agency, Inc., as hereinafter provided for in this judgment.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the Plaintiff Nor-Tex Agency, Inc., does have, and it is hereby vested with a lien on the same interests in and to all of the above-mentioned

oil and gas leases which it received by virtue of the letter agreements and the assignments from Richard M. Jones mentioned above, together with the same interests on all oil wells situated thereon, and to the pipe, tubing, rods, tanks, separators, pumping equipment, and all other personal property situated thereon or used in connection with said leases, to secure the payment of the judgment for $356,981.64, together with interest adjudged against the Defendant Richard M. Jones as above provided; and that such lien shall be first and superior to all rights, titles, and interest of every kind and character of the Defendant Richard M. Jones and his heirs, successors, legal representatives and assigns.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the Plaintiff Nor-Tex Agency, Inc., have foreclosure of the lien provided for above on and against the undivided interest in said oil and gas leases and the above-mentioned personal property situated thereon or used or obtained in connection therewith, being the same property that he acquired from the Defendant Richard M. Jones and that an order of sale shall issue to the United States Marshal directing him to seize and sell such above-described property, the same as under execution in satisfaction of the judgment in favor of the Plaintiff Nor-Tex Agency, Inc., against the Defendant Richard M. Jones as set forth in preceding portions of this judgment; and if the above-described properties shall sell for more than a sufficient sum to pay off and satisfy

such sum of money due the Plaintiff Nor-Tex Agency, Inc., from the Defendant Richard M. Jones, then the officer is hereby directed to pay same to the Defendant Richard M. Jones.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED by the Court that the orders of sale provided for in this judgment shall each have the force and effect of a writ of possession between the parties to this suit and any person claiming under the Defendant Richard M. Jones, and the said United States Marshal or other officer executing this order of sale shall proceed by virtue thereof to place the purchaser of the property sold pursuant to this judgment in possession thereof within thirty (30) days thereafter after the date of sale.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Defendant Richard M. Jones holds all of his interest in the Bexar County tract described above by metes and bounds in trust for the benefit of Defendant and Cross-Plaintiff Charles Owen.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Defendant and Cross-Plaintiff Charles Owen is granted a judgment over and against the Defendant Richard M. Jones, and is entitled to be indemnified by Jones to the extent Jones is benefited by the payment by Owen of any sums of money to or for the benefit of Plaintiff W. E. Riley in satis-

faction of the joint and several judgment herein granted Riley against Owen and Jones.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the suits, claims, causes of action, and third-party actions asserted by the Defendant Richard M. Jones as a third-party Plaintiff against the third-party Defendants Rey-Tex Petroleum Corp., and John F. Reynolds be, and they are hereby dismissed without prejudice to the said Defendant and third-party Plaintiff, Richard M. Jones.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the Planitiffs W. E. Riley and Nor-Tex Agency, Inc. take nothing against the Continental National Bank of Fort Worth by this suit, and the suits, claims, and causes of action asserted by Plaintiffs W. E. Riley and Nor-Tex Agency, Inc., against the said Continental National Bank of Fort Worth are hereby dismissed with prejudice to either such party ever to file same again.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that costs of court are charged to Defendant Richard M. Jones, for which let execution issue.

SIGNED on this 8th day of February, 1972.

/ss/ R. D. Hill
Judge Presiding

## APPENDIX C

## PERTINENT TEXT OF THE STATUTES AND REGULATIONS INVOLVED

### Federal Securities Act of 1933—15 U.S.C. Sec. 77

77b. Definitions.—When used in this title [§§ 77a-77aa of this title] unless the context otherwise requires—

(1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security," or any certificate of interst or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

* * * * *

77c. Exempted securities.—(a) Except as hereinafter expressly provided, the provisions of this title * * * shall not apply to any of the following classes of securities:

* * * * *

(11) Any security which is a part of an issue offered and sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within or, if a corporation, incorporated by and doing business within, such State or Territory.

* * * * *

77d. Exempted transactions.—The provisions of section 5 * * * shall not apply to—

* * * * *

(2) transactions by an issuer not involving any public offering.

* * * * *

77l. Civil liabilities arising in connection with prospectuses and communications. — Any person who—

* * * * *

(2) Offers or sells a security (whether or not exempted by the provisions of Section 3 * * * other than paragraph (2) of subsection (a) thereof), by the use of any means or instruments of transporta-

tion or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a materal fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security. * * *

* * * * *

**Federal Securities Exchange Act of 1934—**
**15 U.S.C. Sec. 78**

78c. Definitions and application—(a) Definitions. When used in this title * * * unless the context otherwise requires—

* * * * *

(10) The term "security" means any note, stock, treasury stock, bond, debenture, certificate of inter-

est or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's aceptance, which has a maturity at the time of issuance of not exceding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

* * * * *

78j. Regulation of the use of manipulative and deceptive devices.—It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * * * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the

Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. * * *

* * * * *

**Securities & Exchange Commission Rule 10b-5**

Rule 10b-5. Employment of Manipulative and Deceptive Devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

* * * * *

## APPENDIX D

## SETTLEMENT AGREEMENT OF RESPONDENTS CONTINENTAL NATIONAL BANK, W. E. RILEY AND CHARLES OWEN—IDENTIFIED AS JONES' EXHIBIT 164, BUT EXCLUDED FROM THE JURY IN TRIAL

### AGREEMENT

This Agreement this day made and entered into by and between the Continental National Bank of Fort Worth, ("Bank"), Charles T. Owen, ("Owen"), and William E. Riley, ("Riley"), all of Fort Worth, Tarrant County, Texas

### WITNESSETH:

WHEREAS, on May 26, 1967 Richard M. Jones ("Jones"), also of Fort Worth, Tarrant County, Texas, executed and delivered to Bank, his promissory note in the original principal amount of $111,000.00. The unpaid principal balance thereof is $46,086.20 which is due and payable on May 27, 1971 together with interest from November 28, 1970 at the rate of 7% per annum as provided in said note. The note is secured by a Deed of Trust of even date therewith, executed by Jones to Leigh Thornton, Trustee for the benefit of the Continental National Bank of Fort Worth, covering a 420 acre tract of land, more or less, in Bexar County, Texas described

as being the same land conveyed to Harry Landa by Nathan Underwood by Deed dated December 29, 1906 recorded in Vol. 261, Page 173 of the Deed Records of Bexar County, Texas, and described by metes and bounds in said Deed of Trust which is recorded in Vol. 5752, Page 839 of the Deed of Trust Records of Bexar County, Texas.

AND, WHEREAS, on May 31, 1967, Owen executed and delivered to Jones his promissory note in the original principal amount of $79,666.67, payable in six annual installments beginning June, 1968. The unpaid principal balance thereof is $50,113.18, together with interest thereon at the rate of 7% per annum from June 1, 1969. The note is secured by a Vendor's Lien retained in the Deed dated May 31, 1967 from Richard M. Jones to Charles Owen which is recorded in the Deed Records of Bexar County, Texas, covering an undivided one-half interest in the above described property and by a Deed of Trust dated May 31, 1967, to Leigh Thornton, Trustee for the benefit of Richard M. Jones which is recorded in the Deed of Trust Records of Bexar County, Texas.

AND, WHEREAS, on June 1, 1968, Riley executed and delivered to Jones and Owen his promissory note in the original principal amount of $43,777.78, payable in four equal annual installments beginning June 1, 1969. The unpaid principal balance thereof is $34,444.45 together with interest at the rate of 7% per annum from June 1, 1969. The note

is secured by a Vendor's Lien which was retained in the Deed of even date therewtih from Jones and Owen, to Riley, conveying an undivided 1/3 interest in the above described property, and by a Deed of Trust of even date, to Leigh Thornton, Trustee, covering said interest, which is recorded in Vol. 6002, Page 19 of the Deed of Trust Records of Bexar County, Texas.

AND, WHEREAS, Jones has heretofore transferred and assigned to Bank said above mentioned note executed by Owen dated May 31, 1967 and Jones and Owen have heretofore transfered and assigned to Bank the above mentioned note executed by Riley dated June 1, 1968, together with all the liens securing said two notes, as collateral security to further secure the payment of the balance of $46,086.20, together with interest as aforesaid which is owing on said note dated May 26, 1967 executed by Jones and payable to the order of Bank.

AND, WHEREAS, Civil Action No. CA-4-1298 is pending in the United States District Court, Northern District of Texas, Fort Worth Division, wherein Riley, Jones, Owen, and the Continental National Bank of Fort Worth (and others) are parties and in said action, among other relief, Riley seeks to cancel and rescind the transaction in which he acquired the undivided 1/3 interest in the above described land in Bexar County, Texas from Jones and Owen, and to recover the consideration paid, and to cancel the note dated June 1, 1968 which was delivered to Jones and

Owen as part of the consideration therefor and Owen seeks to recover damages against Jones, claimed to have been suffered in the transaction by which he acquired the undivided 1/2 interest in said land from Jones.

AND, WHEREAS, in said suit, Riley has alleged that Bank is not a holder in due course of said note dated June 1, 1968, executed by him and now held by Bank as collateral security to secure the payment of the note of May 26, 1967, executed by Jones and that neither Jones, Owen or Bank can enforce payment thereof or make a valid sale of his interest in said property by foreclosure and sale under his Deed of Trust or otherwise.

AND, WHEREAS, to avoid litigation between said parties as to the Bank's rights and interests in said land and notes above mentioned, Riley, Owen and Bank have made the following agreement:

It is agreed by and between said parties:

(1) Bank is entitled to receive the sum of $46,-068.20 as the unpaid balance on principal together with interest from November 28, 1970 at the rate of 7% per annum to date of payment which is the amount due on the promissory note executed by Jones to Bank dated May 26, 1967 in the original principal amount of $111,000.00.

(2) Bank is holder in due course of said note of May 26, 1967, executed by Jones in the original principal amount of $111,000.00, and is an innocent purchaser for value and holder in due course of the promissory note dated May 31, 1967, executed by Owen in the original principal amount of $79,666.67 and of the promissory note dated June 1, 1968 executed by Riley in the original principal amount of $43,777,78 insofar as they represent obligations to pay the unpaid balances set forth above.

(3) Owen and Riley agree that, despite any pleading filed in, and/or any judgment that may be entered in said above mentioned action, and, despite Bank's failure to file counterclaims against them therein based on their notes held by the Bank as collateral for the payment of the Jones note (they having requested Bank not to file such counterclaims which might otherwise be deemed to be waived by the Bank's failure to assert the same) they will not contest the right of Bank hereafter to sue and recover judgment against them, or either of them or Jones, for unpaid and matured principal and interest on the notes or any one or more of the notes hereinabove described in the first four unnumbered paragraphs, as the same may be extended, and in connection with any such suit or suits, or independently of them, to foreclose the liens and pledge interests contained in the Deeds of Trust and Security Agreements executed by Jones, Riley and Owen in connection with the aforementioned notes through the exercise of any

rights or powers given Bank by law on such collateral instruments.

(4) Riley agrees to take no action in the above mentioned Civil Action insofar as it asserts a claim for relief against Bank, and to seek no judgment against Bank, and to either dismiss Bank from such suit with prejudice to his right to file any other cause of action against the Bank pertaining to the same subject matter of the claim he has asserted against the Bank therein, or to allow the Court to enter a "take nothing" judgment in favor of Bank against Riley therein.

(5) Bank agrees that it will not sue Jones or Owen or Riley or any of them or foreclose its liens or any of them on the land described in the Deeds of Trust above described by suit or by the exercise of the powers of sale given in such Deeds of Trust nor will it take any action under the Collateral Pledge Agreements above mentioned until a final District Court judgment has been entered in said cause No. CA-4-1298, or until December 31, 1971 whichever is the earlier date. This agreement is made on the condition that the Jones note, which will become due May 27, 1971, will be renewed on or before that date with interest paid to that date, and that the Deed of Trust securing such note will be renewed and extended by Jones at the same time. Should such note and Deed of Trust not be so renewed, Bank shall be entitled to proceed to enforce all legal and equitable

remedies available to it relating to such note and the security for the same. The fact that said judgment may be appealed and reversed, or that any party may have perfected or attempted to perfect an appeal from the judgment entered by the United States District Court in said cause shall not, for the purpose of this Agreement in any manner be considered as affecting the finality of a judgment rendered by said District Court. Bank agrees, however, that under no circumstances will it sue Jones or Owen or Riley, or any of them. Bank further agrees that it will not thereafter sue Jones or Owen or Riley or any of them or seek to foreclose any of its liens on the land described in the Deeds of Trust above described by suit or by the exercise of the power of sale given it in such Deeds of Trust or foreclose its collateral Pledges of the Owen and Riley notes above mentioned without first giving each of said parties 30 days written notice of its intent and that during said thirty day period said parties as herein provided shall have the right to pay to the Bank the total sum of principal and interest then owing on the note executed by Jones above mentioned. Jones as maker of said note shall have the prior right herein provided but if he shall fail to exercise same, Riley and Owen jointly or if one of such parties should refuse to join, the other individually shall have the right of payment herein provided. In event Jones pays said sum due on said note, he shall be entitled to a release of said note and Deed of Trust lien securing same, and a return of the security held by the Bank under the Collateral

Pledge Agreements above mentioned. If Owen or Riley or either of them shall pay to Bank the sum due on said note, the payor(s) shall be entitled to receive from Bank an assignment of said note and all rights and liens securing same, but without warranty of any kind, either express or implied. Bank agrees that it will loan Owen the monies to make sufficient payments to avoid the necessity of foreclosure of the Deeds of Trust or other liens herein mentioned, conditioned upon Owen providing Bank with acceptable collateral or financial statements to support the debts herein mentioned.

(6) Bank further agrees that if it should become the owner of the above mentioned 420 acre tract of land or any interest therein, it will not sell or otherwise dispose of such land or interest therein, until final disposition in the above mentioned suit of the claims asserted by Jones, Riley and Owen against each other, relating to the notes and the security hereinabove described, and then only by giving Riley, Owen and Jones each a period of thirty days after written notice within which to repurchase and retain his interest in the land upon the payment of the principal and interest due on his note, and that meantime it will not seek to enforce any judgment which it may obtain against Jones or Riley or Owen by execution levied on any property owned by any of them other than the property described in the Deeds of Trust hereinabove referred to.

EXECUTED this the ..... day of ....., 1971.

CONTINENTAL NATIONAL
BANK OF FORT WORTH

By /s/ James M. Fry
Exec. Vice-President

/s/ W. E. Riley
W. E. RILEY

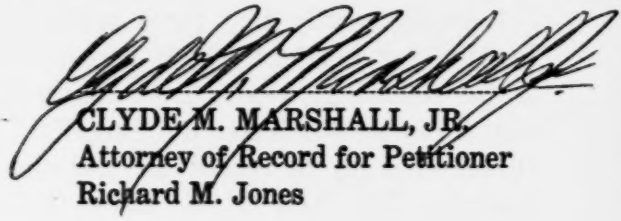
/s/ Charles Owen
CHARLES OWEN

## CERTIFICATE OF SERVICE

I hereby certify that three printed copies of this Petition for Certiorari have been served upon each of the following, to-wit: Hon. Henry W. Simon, Simon & Simon, 800 Baker Building, Fort Worth, Texas 76102, attorney of record for Respondents Nor-Tex Agencies, Inc., and W. E. Riley; Hon. Thomas H. Law, Law, Snakard, Brown & Gambill, 1500 Fort Worth National Bank Building, Fort Worth, Texas 76102, attorney of record for Respondent Charles Owen; Hon. Ogden K. Shannon, Jr., Shannon, Gracey, Ratliff & Miller, 2700 Continental National Bank Building, Fort Worth, Texas 76102, attorney of record for Respondent Continental National Bank of Fort Worth; and the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530; by United States Mail, first class postage prepaid, this 7th day of January, 1974.

Service on the Solicitor General is made because 28 U.S.C. Section 2403 may be applicable. Petitioner's attack is upon the wrongful construction and application of the Federal Securities Acts by the courts below as being violative of constitutional due process, but alternatively or conditionally questions constitutionality of some provisions of the Acts if such applications are thereby compelled. Neither the Court of Appeals nor the District Court below has certified to the Attorney General that constitutionality of such

Acts was drawn in question, so far as known to Petitioner or his counsel.



CLYDE M. MARSHALL, JR.
Attorney of Record for Petitioner
Richard M. Jones

## TABLE OF CONTENTS

*Page*

List of Authorities ..... ii

Jurisdiction ..... 1

The Facts ..... 3–8

There Was More Involved in The Bexar County Transaction Than a Mere Arms-Length Conveyance of Realty ..... 4

The Law ..... 8–18

The Bexar County Transaction Involved The Sale and Purchase of a Security ..... 8

The Exemptions in the 1933 and 1934 Acts Have No Application to This Case ..... 10

Even if the Trial Court Did Not Have Original Jurisdiction of Owen's Claims, Which is Denied, It Had Ancillary Jurisdiction ..... 12

The Trial Court Had Pendent Jurisdiction to Hear, and Award Recovery on, Owen's Nonfederal Claims ..... 13

The Trial Court Did Not Abuse His Discretion In Allowing Riley to Assert His Claims And In Allowing Owen to Prosecute His Cross-Claim Against Jones ..... 14

The Trial Court Did Not Abuse His Discretion In Granting the Bank's Motion to Dismiss the Counterclaims of Jones ..... 16

The Trial Court Did Not Err In Excluding From the Jury the Settlement Agreement Between the Bank, Riley and Owen ..... 16

The Questions Submitted To the Jury Fairly Presented the Theories of Recovery and Defense ..... 17

Under Owen's Theories of Recovery, The Judgment Rendered For Him The Relief To Which He Was Entitled ..... 18

Conclusion and Prayer ..... 21

Certificate of Mailing ..... 22

Appendix ..... 23

## LIST OF AUTHORITIES

*Cases:* *Page*

Associate Securities Corporation v. SEC, 293 F.2d 738, 741-42 (10th Cir. 1961) ..... 11

Brooklyn Union Gas Co. v. Transcontinental Gas Pipe Line Corp., 201 F. Supp. 679 (D.C. Tex. 1960) aff'd 299 F.2d 692, cert. den'd, 371 U.S. 887, 83 S.Ct. 182, 183, 185, 9 L.Ed.2d 121 ..... 13

Brown & Root, Inc. v. Gifford-Hill & Co., 319 F.2d 65 (5th Cir. 1963) ..... 14

Childress v. Cook, 245 F.2d 798 (5th Cir. 1957) ..... 13

Cochran v. Channing Corp., 211 F. Supp. 239 (D.C. N.Y. 1962) ..... 14

DeWitt v. Sorenson, 288 F.2d 455 (5th Cir. 1961) ..... 18, 20

Donahue v. Davis, 68 So.2d 163 (Fla.Sup. 1953) ..... 20

Ellis v. Carter, 291 F.2d 270 (9th Cir. 1961) ..... 14

Errion v. Connell, 236 F.2d 447 (9th Cir. 1956) ..... 10, 14

Fitz-Gerald v. Hull, 237 S.W.2d 256 (Tex.Sup. 1951) ..... 18

Hill York Corp. v. American International Franchises, Inc., 448 F.2d 680, 695-696 (5th Cir. 1971) ..... 11

Hurn v. Oursler, 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed.2d 1148 (1933) ..... 13

Jung v. K. & D. Mining Co., 260 F.2d 607 (7th Cir. 1956) ..... 14

McComb v. McCormack, 159 F.2d 219, (5th Cir. 1947) ..... 13

Miller v. Bargain City, U.S.A., Inc., 229 F. Supp. 33 (D.C. Pa. 1964) ..... 14

Meinhard v. Salman, 249 N.Y. 458, 164 N.E. 545, 546 (Ct. of App. N.Y. 1928) ..... 3

Moe v. Lowry, 194 P. 363 (Colo. Sup. 1921) ..... 20

Pawgan v. Silverstein, 265 F. Supp. 898 (D.C. N.Y. 1967) ..... 11

Revere Copper & Brass, Inc. v. Aetna Cas. & Surety Co., 426 F.2d 709 (5th Cir. 1970) ..... 13

## LIST OF AUTHORITIES (Continued)

*Page*

Scott v. Fancher, 369 F.2d 842 (5th Cir. 1966) ..... 13
S.E.C. v. C. M. Joiner Corp., 320 U.S. 344, 351, 64 S.Ct. 120, 88 L.Ed. 88, 93 (1943) ..... 9
Securities & Exchange Commission v. Federal Shopping Way, Inc., 433 F.2d 148 (9th Cir. 1970) ..... 9
Tcherepnin v. Knight, 389 U.S. 332, 88 S.Ct. 548, 19 L.Ed.2d 564 (1967) ..... 9
United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) ..... 14
Weber v. C.M.P. Corp., 242 F. Supp. 321 (D.C. N.Y. 1965) ..... 14
Whittaker v. Wall, 226 F.2d 868 (8th Cir. 1955) ..... 19
Wood v. Precise Vac-U-Tronic, 192 F.Supp. 619 (D.C. Pa. 1961) ..... 14
Woodward v. Wright, 266 F.2d 108, 116 (10th Cir. 1959) ..... 11

*Statutes:*

Supreme Court Rules
Rule 19 ..... 1, 2
F.R.C.P.
Rule 13 ..... 16
Rule 13(g) ..... 12
Rule 20(a) ..... 15
Rule 20(b) ..... 15
Rule 42 ..... 16
15 U.S.C.A.
Article 77b(1) ..... 8
Article 77c(a)(10) ..... 9
Article 77d ..... 10, 11
Article 77e ..... 11
Article 77l(2) ..... 11
Article 77q ..... 10, 11
Article 77q(a) ..... 7
Article 77q(c) ..... 10
Article 77v(a) ..... 9
Article 78aa ..... 9
Article 78c(12) ..... 11

## LIST OF AUTHORITIES (Continued)

*Page*

Securities Act of 1933 ..... 9
Securities Exchange Act of 1934 ..... 9
Rule X-10B-5 ..... 7
Business and Commerce Code of Texas ..... 18, 23

*Treatises:*

Bromberg, Securities Law ..... 11
II Loss, Securities Regulation Ch. 6A(b)(i) ..... 9, 11
11 Sowards Business Organizations ..... 11
3 Moore's Federal Practice ..... 13

*Encyclopedias:*

46 American Jurisprudence 2d ..... 20

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1068

RICHARD M. JONES, *Petitioner*

*v.*

NOR-TEX AGENCIES, INC., W. E. RILEY, CHARLES OWEN and CONTINENTAL NATIONAL BANK OF FORT WORTH, *Respondents*

## Respondent Charles Owens's Reply to Petition for Writ of Certiorari

To The United States Court of Appeals
For The Fifth Circuit

*TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:*

### JURISDICTION

Respondent Charles Owen denies that this Honorable Court has jurisdiction to entertain the Petition for Writ of Certiorari sought by Petitioner, Richard M. Jones, and, therefore, such Petition should, in all things, be denied.

The record before this Court does not bring this case within the purview of Rule 19, Supreme Court Rules. There is no "special and important reason" for a review on writ of certiorari of the decision of the Court

of Appeals (reported at 482 F.2d 1093). Petitioner cannot contend that the Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the decision of another Court of Appeals on the same matter, has decided an important question of federal law not heretofore decided or has decided a federal question in a matter which conflicts with applicable decisions of this Court. Neither has the Fifth Circuit here "decided an important state or territorial question in a way conflicting with applicable state law," nor has it so departed from the accepted and usual course of judicial proceedings, the only remaining reason under Rule 19, to warrant this Court's power of supervision.

Petitioner, in a shrill and hysterical manner, claims, as he always has, that Respondents colluded against him. In addition, he now claims or implies that the trial court cooperated in this collusive scheme (Pet. p. 11); that it was the "unwitting dupe" of the Respondents (Pet. p. 9); that it and the appellate court were guilty of "unfair practices" (Pet. p. 35); that it systematically destroyed Petitioner's chance to secure favorable jury findings (Pet. p. 46); that it entered into a "concerted plan" with Respondents to withhold clearly admissible evidence from the jury (Pet. p. 52); and, that it distorted the case (Pet. p. 52). Petitioner then accuses the Court of Appeals of perfunctorily reviewing the case (Pet. p. 46) and, further, charges that its holding is an "absurdity" (Pet. pp. 40 & 45) and "ludicrous" (Pet. p. 42).

The fact is, simply stated, that the trial judge and

the Court of Appeals merely applied established law to the jury's findings of fact and, in so doing, struck down acts of fraud so blatant and cynical as to be utterly repugnant even to the "morals of the market place."[1]

## THE FACTS

The Statement of the Case in the Petition for Writ of Certiorari filed herein is devoid of a single, specific reference to the transcript or the record on appeal. Instead, Petitioner (hereinafter sometimes referred to as "Jones") is content to place himself before this Honorable Court, not surprisingly, with a highly biased, simplistic, emotional, incomplete and inaccurate statement of the case. Taken unchallenged, Petitioner's rendition of the operative facts and law would have, under any circumstances, entitled him to a direct verdict. For these reasons, Respondent (herinafter referred to as "Owen") chooses to state the facts as shown *by the record on appeal*, some of which are contained in the opinion by the Fifth Circuit Court of Appeals, all of which should be brought before this Court.

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[1]Mr. Justice Cardozo in *Meinhard v. Salman*, 249 N.Y. 458, 164 N.E. 545, 546 (Ct. of App. N.Y. 1928).

## There Was More Involved in The Bexar County Transaction Than a Mere Arms-Length Conveyance of Realty

In April of 1967, Owen was approached by Jones to form a joint venture in order to purchase a 420-acre tract of land in Bexar County, Texas, from Mr. Robert Maddox for a total price of $260,000 (Tr. 1724), or $130,000 each (Tr. 44-46; 49-50; 1724). However, Jones emphasized to Owen that he had a special situation with Maddox and that Owen should not talk to Maddox about the proposal (Tr. 60). Jones further told Owen that in addition to having five oil wells on the property, it also had huge gravel deposits which were very valuable (Tr. 47). Owen then contacted a Mr. James Williford to inquire whether he would be interested in a one-third interest in the venture (Tr. 51-52; 161-163). On April 23, 1967, Owen and Jones drove to San Antonio and met with Williford to look over the property (Tr. 1720). On this occasion, Jones reaffirmed that the purchase price of the property from Maddox was $260,000 (Tr. 66; 166; 170; 196-197); and, with the oil reserves being what they were, and with the amount of gravel there, that $260,000 was a good price from the buyers' standpoint (Tr. 66; 167-168). A few days later Jones called Williford and encouraged him to come into the venture on the basis that Jones, Owen and Williford would purchase the property from Maddox and each would then own one-third (Tr. 173). On April 28, 1967, Jones told Owen that Maddox would hold the offer open for another thirty

days if he could get $21,000 option money (Tr. 53). He further told Owen that he, Jones and Williford should each put up $7,000 (Tr. 53). On May 1, 1967, Owen drew a check payable to Jones for $14,000, representing his and Williford's share of the option price of $21,000 (Tr. 55; Tr. 1132; OX 12).[2] Owen received by mail from Jones a letter which reduced the agreement to writing (OX 1). Williford was unable to arrange financing to enter into the venture (Tr. 67, 69; 173-174). However, Jones offered to continue it on a 50-50 basis with Owen (Tr. 69) even though (according to what Jones told Owen) Jones's wife would have to sell her fur coat and Cadillac in order for Jones to be able to put up his part (Tr. 70). This impressed Owen and he agreed to participate. On May 31, 1967, he drew another check payable to Jones for $36,333.33 (OX 13) and signed a promissory note to Jones for $79,666.67 (OX 11), which, together with the $14,000 previously delivered to Jones, made Owen's total investment $130,000 (Tr. 40; 74). Owen then received a deed dated May 31, 1967, from Jones and his wife (Tr. 76-78; OX 2) conveying a one-half undivided interest in the 420-acre tract, *along with an undivided one-half interest in the mineral estate (subject to an oil and gas lease covering the south 200 acres) and one-half of Jones's 1/6 royalty interest.*

Unknown to Owen, Jones actually had contracted to purchase, and did in fact purchase, the entire tract

[2]For clarity, the following reference is made: OX – Owen Exhibit.

from Maddox for $125,000 (Tr. 39).[3] Owen did not find this out until January 5, 1970, when Respondent Riley's attorney was taking his deposition in this litigation (Tr. 897). In short, Jones purchased the entire tract from Maddox for $125,000 and immediately, as a part of the transaction, conveyed an undivided one-half interest to Owen for $130,000, all the time representing to Owen that the purchase price from Maddox was $260,000. Jones in fact used Owen's money in order to pay Maddox.

In July of 1968, Jones and Owen conveyed an undivided one-third (or 1/6th each) interest to Riley for an agreed total consideration of $100,000 (Tr. 40).

Riley instituted this suit against Jones and Owen for rescission of the note he executed in their favor (R. 1). Owen filed an answer denying that he was liable to Riley (R. 79). Subsequently, when Riley's attorney was taking his and Jones's depositions, Owen learned for the first time that Jones had deceived him as well as Riley; that Jones in fact had used Owen's money to purchase the Maddox property for $125,000, told Owen that the cost was $260,000 and in effect had charged Owen $130,000 for his one-half interest in the $125,000 joint venture. Owen thereupon amended his pleading to assert a cross-claim against Jones for damages. Owen's cross-claim alleged that Jone violated the anti-fraud provisions of the Securi-

[3]On the deed running from Maddox to Jones, Jones placed and cancelled with his initials revenue stamps reflecting that he paid Maddox $260,000 for the property (Tr. 78-85; 1528; OX 27)! On the deed running from Jones and wife to Owen, however, the correct amount of revenue stamps were placed by Jones on the deed showing a consideration of $130,000 (Tr. 78, 85; OX 2).

ties Act of 1933[4] and the Securities Exchange Act of 1934[5]; that Jones was liable to Owen because he violated Section 27.01 of the Business and Commerce Code of Texas[6]; that Jones breached his fiduciary duties to Owen and, therefore, held his interest in the Bexar County tract in trust for Owen's benefit; and, that Jones made a secret profit at the expense of his co-venturer, Owen, and should be made to account for it.

Trial was to a judge and jury. The jury returned a verdict (R. 386-450) which, by its answers to 49 separate questions, determined all issues against Jones (except that it refused to award Owen exemplary damages) and in favor of Owen and Riley. The jury was submitted separate issues predicated on violations of the Securities Acts, Section 27.01, supra, and violations of common law fiduciary duties. Each and every element encompassed by those theories was submitted to the jury (R. 386-450). Based on the jury's verdict, the trial judge rendered his judgment (R. 514) which, inter alia, granted Riley all relief prayed for by him. The judgment was joint and several, being against *Owen* as well as Jones (a point Petitioner never mentions as it is not in keeping with his "brother-in-law" theory). This part of the judgment was based on the jury's findings that even though *Owen* made no false representations, and had no knowledge that Jones had done so (R. 445), nevertheless Jones's false statements to Riley were made within the scope of the joint ven-

[4]15 U.S.C.A. §77(q)(a) sometimes cited as §17(a).
[5]Rule X-10B-5, promulgated pursuant to such Act.
[6]Reproduced verbatim in the Appendix.

ture of Owen and Jones (R. 446); thus, Owen was vicariously liable to Riley. The judgment also awarded Owen all affirmative relief prayed for by him against Jones.

## THE LAW

### The Bexar County Transaction Involved The Sale and Purchase of a Security

As we understand it, Jones makes the argument that the sale by him to Owen did not involve a security and that their subsequent sale to Riley likewise did not involve a security. Arguing further, Jones says that even if these were sales of securities, they were "exempt" and no liability could attach to him. We disagree.

It should be remembered at the outset that by deed dated May 31, 1967, Jones and his wife conveyed to Owen an undivided one-half of the surface as well as an undivided one-half of the mineral estate which was subject to an existing oil and gas lease covering only the South 200 acres, plus an undivided one-half of their royalty interest (OX 2). Further, it included one-half of the gravel. The 1933 Act defines a security as follows: "(1) The term 'security' means any note . . . *fractional undivided interest in oil, gas or other mineral rights* . . ."[7] (Emphasis added). The 1934 Act thus defines a security: "(10) The term 'security' means any note . . . certificate of interest or participation in any profit-sharing agreement or in *any oil, gas*

[7]15 U.S.C.A. §77b(1)

*or other mineral royalty or lease . . .*"[8] (Emphasis added).

Owen submits that, *by definition*, he purchased a security from Jones. The '33 Act gives the federal courts concurrent jurisdiction with the state courts of suits brought pursuant to it,[9] and the '34 Act gives the federal courts exclusive jurisdiction of suits brought under it.[10] The definitions of a security as contained in the '33 and '34 Acts have traditionally been given an expansive, as opposed to a restrictive, interpretation.[11] *Tcherepnin v. Knight*, 389, U.S. 332, 88 S.Ct. 548, 19 L.Ed.2d 564 (1967); *S.E.C. v. C. M. Joiner Corp.*, 320 U.S. 344, 351, 64 S.Ct. 120, 88 L.Ed. 88, 93 (1943).

Owen submits that, as a matter of law, the deed from Jones and his wife which conveyed to him an undivided one-half interest in the mineral estate and royalty rights, on its face answered to the description of a security as defined by the 1933 and 1934 Acts. Indeed, an ordinary royalty interest, whether or not undivided, is viewed as a security under the 1934 Act. II Loss, *Securities Regulations*, Ch. 6A(b)(i), p. 796.

Appellant Jones does not argue that the trial court had no jurisdiction because a "non-security" (the surface) was coupled with a "security" (the undivided

[8] 15 U.S.C.A. §78c(a)(10)

[9] 15 U.S.C.A. §77v(a)

[10] 15 U.S.C.A. §78aa

[11] The Ninth Circuit has recently held that a fractional undivided interest in real estate, *standing alone*, was a security under the '33 Act. *Securities & Exchange Commission v. Federal Shopping Way, Inc.*, 433 F.2d 148 (9th Cir. 1970).

interest in the mineral estate and royalty interest.) Nor could he. It is settled that a transaction in which a non-security is coupled with a security will be treated as a security. *Errion v. Connell*, 236 F.2d 447 (9th Cir. 1956).

In summary, the transaction between Jones and Owen involved a security as that term is and has been defined under the '33 and '34 Acts and, therefore, the trial court had original jurisdiction over both his and Riley's claims

**The Exemptions in the 1933 and 1934 Acts Have No Application to This Case**

Jones has always complained that the trial court had no jurisdiction because the sale to Owen was an "exempt" transaction. In his latest Brief, he insinuates this, although even he now seems to concede that this hypothesis has no validity.

The anti-fraud provisions of the '33 and '34 Acts are not diluted by the exemptions contained in those Acts. For example, in 15 U.S.C.A. §77q, it is provided in Subsection (c) in clear, unequivocal and unarguable language that:

> "(c) The exemptions provided in Section 77c of this title *shall not apply to the provisions of this section.*" (Emphasis added)

Nor it is material whether the transaction was "unregulated" when recovery is sought under the anti-fraud provisions. This is clear from the preamble to 15 U.S.C.A. §77d which describes "Exempted transac-

tions," including so-called "private offerings," wherein it is stated, "The provisions of Section 77e of this title shall not apply to — ." Of course, §77e is the section of the '33 Act which describes those transactions which are unlawful *unless a registration statement is in effect.* In short, by definition, those transactions described in §77d are exempt only from the registration provisions of §77e. If those same transactions were also exempt from the anti-fraud provisions, then the preamble to §77d would have stated that the transactions therein described were also exempt from the provisions of §771(2) and 77q. It does not. Neither is this transaction exempt under the '34 Act. 15 U.S.C.A. §78c(12). See *Hill York Corp. v. American International Franchises, Inc.*, 448 F.2d 680, 695-696 (5th Cir. 1971); *Woodward v. Wright*, 266 F.2d 108, 116 (10th Cir. 1959); *Associate Securities Corporation v. SEC*, 293 F.2d 738, 741-42 (10th Cir. 1961); *Pawgan v. Silverstein*, 265 F. Supp. 898 (D.C. N.Y. 1967); Bromberg, *Securities Law*, p. 82, §4.6 (210) wherein it is stated that Rule 10b-5 has application in "private transactions" and, "it is immaterial that such transactions may be exempt from the registration requirements of the 1933 Act . . ."; *Bromberg*, supra, at p. 22.9, §2.4(451) "Direct - Personal (Private) Transactions," and cases therein cited; *Bromberg*, supra, at pp. 39-40; 11 Sowards, *Business Organizations*, The Federal Securities Act. p. 10-2, §10.01[1]; II Loss, *Securities Regulation*, p. 710 (1961).

Owen will not here argue all of the testimony which

refutes the conclusion of Jones that he was superior to Jones in business experience and therefore not in need of the protection of the Securities Acts. Owen simply invites the Court's attention to the jury's answers to Question No. 43 (R. 440), which were well supported by clear and convincing evidence.

In summary, the question of whether this was a private offering and therefore exempt from the registration requirements is not here reached, since suit was grounded on the anti-fraud provisions of the '33 and '34 Acts.

**Even if the Trial Court Did Not Have Original Jurisdiction of Owen's Claim, Which is Denied, It Had Ancillary Jurisdiction**

Owen's cross-claim against Jones was filed under Rule 13(g), F.R.C.P., which provides:

> "A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence which is the subject either of the original action or of a counterclaim therein *or relating to any property that is the subject matter of the original action . . .*" (Emphasis added)

In view of the fact that Owen's cross-claim related to the very same property that was the subject matter of Riley's complaint, it is easy to understand why the trial court entertained the cross-claim.

Even assuming, arguendo, that the court did not have an independent jurisdictional ground to entertain the cross-claim, which is denied for the reasons stated

above, still the court had ancillary jurisdiction over the cross-claim by virtue of its jurisdiction of the main suit. *Scott v. Fancher*, 369 F.2d 842 (5th Cir. 1966); *McComb v. McCormack*, 159 F.2d 219, (5th Cir. 1947); *Childress v. Cook*, 245 F.2d 798 (5th Cir. 1957); *Revere Copper & Brass, Inc. v. Aetna Gas & Surety Co.*, 426 F.2d 709 (5th Cir. 1970); *Brooklyn Union Gas Co. v. Transcontinental Gas Pipe Line Corp.*, 201 F. Supp. 679 (D.C. Tex. 1960), aff'd 299 F.2d 692, cert. den'd, 371 U.S. 887, 83 S.Ct. 182, 183, 185, 9 L.Ed.2d 121; 3 Moore's *Federal Practice*, pp. 97-98, §13.36.

**The Trial Court had Pendent Jurisdiction to Hear, and Award Recovery on, Owen's Nonfederal Claims**

As previously stated, Owen sued Jones for violation of federal fraud statutes, a state fraud statute and breach of fiduciary duties. The trial court heard evidence concerning all of Owen's claims (as well as Jones's defenses), submitted questions to the jury inquiring whether Jones had violated the federal and state laws (R. 428-450), and, based upon the jury's verdict, rendered judgment for Owen against Jones awarding Owen all relief prayed for (R. 514). (Jones fails to mention in his Petition that Owen secured jury findings on his nonfederal fraud theories.)

A federal court has "pendent" jurisdiction to hear and decide nonfederal claims joined with a claim arising under federal law. *Hurn v. Oursler*, 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed.2d 1148 (1933). Whether to

exercise pendent jurisdiction is a matter for the discretion of the trial court. *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). See also, *Brown & Root, Inc. v. Gifford-Hill & Co.*, 319 F.2d 65 (5th Cir. 1963); *Cochran v. Channing Corp.*, 211 F. Supp. 239 (D.C. N.Y. 1962); *Weber v. C.M.P. Corp.*, 242 F. Supp. 321 (D.C. N.Y. 1965); *Miller v. Bargain City, U.S.A., Inc.*, 229 F. Supp. 33 (D.C. Pa. 1964); *Jung v. K. & D. Mining Co.*, 260 F.2d 607 (7th Cir. 1956); *Errion v. Connell*, supra, at pp. 11-12; *Ellis v. Carter*, 291 F.2d 270 (9th Cir. 1961); *Wood v. Precise Vac-U-Tronic*, 192 F. Supp. 619 (D.C. Pa. 1961).

In summary, the trial court had original, ancillary and pendent jurisdiction to hear and decide all of Owen's claims against Jones, and to grant relief thereon.

**The Trial Court Did Not Abuse His Discretion In Allowing Riley to Assert His Claims And In Allowing Owen to Prosecute His Cross-Claim Against Jones**

Petitioner's argument that he was irreparable damaged by the trial court's decision to let Owen prosecute his cross-claim is a classic example of circular reasoning, i.e., he must have been prejudiced because the jury answered all issues against him.

The chronology of events leading up to the filing of this case in federal court has previously been called to the Court's attention. In summary, Riley obtained a joint and several judgment against Jones and Owen

for $81,763.77 (R. 514). There was no collusion between Riley and Owen. Riley was suing the Defendants jointly and severally. When he dismissed the action in state court and filed it in federal court, of course Owen filed his cross-claim against Jones. Owen did not want to "reap" prejudice against Jones. He only sought to show the court and jury how he, too, had been duped by the fraud of his pretended friend. Owen respectfully suggests to the Court that under this record he needed no "prejudice" to prove the willful and patent fraud practiced upon him.

Owen's liability to Riley could attach only vicariously, since the jury found that Jones's misrepresentations to Riley, unbeknownst to Owen, were made while he and Owen were joint venturers (R. 446). In this setting, it is hard to understand how Jones could speak of being prejudiced by Owen's claims. Indeed, one could hardly imagine more prejudice than that which would have befallen Owen had he not been able to prove to the same jury that considered Riley's claims against him, which arose solely from acts and omissions of Jones in the joint venture, his own claims of being defrauded by Jones. Had he not, he would have been placed, in the eyes of the jury, as being in league with a man who defrauded him in much the same manner as the jury found that this man defrauded Riley.

We simply invite this Court's attention to the opinion of the Fifth Circuit wherein it held that the trial judge, pursuant to Rules 20(a) and 20(b), F.R.C.P., acted within his discretion in allowing Riley to be

joined as a party-plaintiff and in refusing to sever Owen's cross-claim against Jones. See also, Rules 13 and 42, F.R.C.P.

**The Trial Court Did Not Abuse His Discretion in Granting the Bank's Motion to Dismiss the Counterclaims of Jones**

Jones argues that since Owen and Riley were seeking to cancel and rescind their notes to him he should have been allowed to pursue his actions against them on their notes. We disagree. Owen, as previously stated, was not seeking rescission. His suit was for damages.

The relevant portions of the agreement whereby Jones pledged the Owen note to the Bank (OX 31) are set forth in the opinion below. It is clear that, by contract, Jones, as pledgor of the Owen note, had no right, power or authority to sue on it or otherwise attempt to foreclose the lien securing it. The Bank, as pledgee, *and only the Bank*, had the sole and exclusive right to sue on the note. Absent its consent, which it refused to give, no action could be taken by Jones against Owen or Riley on the notes.

**The Trial Court Did Not Err In Excluding From the Jury the Settlement Agreement Between the Bank, Riley and Owen**

Jones is mistaken when he says that Owen contended in his trial amendment that his note was void or voidable as to the Bank (R. 371). A fair reading of that pleading entitled "First Amended Answer

of Cross-Plaintiff Charles Owen to Counterclaim of Cross-Defendant Richard M. Jones" shows that he denied that he was liable to Jones on the note; and, *as to Jones*, the note was void; or, in the alternative, voidable because it had been procured by fraud. The Settlement Agreement (JX 164)[12] *does not recognize the validity of the Owen or Riley notes in the hands of Jones.* That Agreement, inter alia, recognized that the Bank was a holder in due course of the Jones, Owen and Riley notes. Nowhere did Owen intend to plead, nor did he plead, that the Bank was not a holder in due course. Clearly the Agreement was not admissible to impeach or contradict Owen's pleadings or testimony. The Court is invited to read the Agreement, and it is submitted that under even the most liberal interpretation, the Agreement could not be used to ratify Owen's transaction with Jones, or estop him from making a claim against Jones, or demonstrate a waiver by him of any of his causes of action against Jones.

**The Questions Submitted To the Jury Fairly Presented the Theories of Recovery and Defense**

Jones contends that he was entitled to issues on estoppel, ratification, waiver and election. He further contends, without attempting to specify where, that there was evidence on these "defensive" issues. *Nowhere in this record* is there the slightest suggestion that Owen was estopped to assert his causes of action; that he ratified Jones's patent fraud; that he made a conscious decision to waive his known rights; or, that

[12]For clarity, the following reference is made: JX – Jones Exhibit.

he acquiesced in Jones's fraudulent conduct. The "Settlement Agreement," which merely recognized that the Bank was a holder in due course of the notes, is devoid of a syllable of evidence that would raise any of these issues. Nor could such Agreement, even if admissible, be used to "impeach" Owen's pleadings, much less his testimony. Nothing further need be said of this "constitutional" point.

**Under Owen's Theories of Recovery, The Judgment Rendered For Him The Relief To Which He Was Entitled**

As stated previously, Owen sued Jones for damages under Section 27.01 of the Bus. & Com. Code of Texas (old Art. 4004, V.A.T.S.); under the fraud provisions of the 1933 and 1934 Federal Securities Acts; and, for breach of his fiduciary relationship. Owen further alleged that Jones held all of his interest in the Bexar County land in trust for his benefit and should thus be made to convey that interest to him. Owen also sued Jones for an accounting for the secret profits he had made from the joint venture. All of these theories of recovery were submitted to the jury, who found all elements of these actions were violated by Jones (R. 428-450). Under the law, and based upon the jury's verdict, this judgment was proper.

As members of a joint venture, Jones and Owen owed to each other all the duties incident to any fiduciary relationship — a high degree of fidelity, scrupulous honesty, good faith and fair dealing. *DeWitt v. Sorenson*, 288 F.2d 455 (5th Cir. 1961); *Fitz-Gerald v. Hull*, 237 S.W.2d 256 (Tex.Sup. 1951). As the jury

found, Jones willfully and intentionally breached that high standard (R. 437; 448). The judgment, reflecting the jury's verdict, properly awarded Owen monetary damages and correctly impressed a lien on Jones's interest in the Bexar County property to secure that judgment. *Whittaker v. Wall*, 226 F.2d 868 (8th Cir. 1955). In *Whittaker*, suit was brought under the '33 Act to recover the consideration paid for unregistered fractional interests in oil and gas leases. Appellant objected to the court's awarding Appellees a lien on the securities, trust funds and other property to insure payment of the judgment. The Court said:

> "In the instant case, all parties are in court, all material issues are pleaded and the disputed relife is merely the exercise of the equity powers of the court in enforcing its judgment. Such extension of relief beyond that asked for in the pleadings has been approved by many cases, [citing cases] and Rule 54(c) of the Federal Rules of Civil Procedure, 28 U.S.C.A., which provides as follows:
>
> > 'Except as to party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.'
>
> Resultantly, it is necessary only for the facts and issues of the case to support the judgment. [citing cases] The violation of the statute here observed is sufficient to warrant the judgment awarded and *we are convinced that the trial court, through specific liens, used a judicious means of enforcing*

> *it.* Likewise, we are convinced that the trial court correctly impressed upon the funds paid for drilling expenses an equitable trust for the benefit of the appellees. [citing cases]" (Ephasis added)

The actions of the trial judge in awarding Owen damages from Jones, in imposing a lien to secure that monetary award, and in decreeing that Jones held all of his interest in the Bexar County land in trust for Owen were, under the law and in equity, proper. In support of these actions see the often-cited cases of *DeWitt v. Sorenson*, supra; *Moe v. Lowry*, 194 P. 363 (Colo. Sup. 1921); *Donahue v. Davis*, 68 So.2d 163 (Fla.Sup. 1953); and, 46 Am.Jur.2d §51-52, *Joint Venturers*, pp. 71-73.

## CONCLUSION AND PRAYER

Despite Petitioner's self-righteous histrionics, no amount of bleating, even if couched in terms of constitutional principles, will alter the fact that he wantonly and willfully defrauded Charles Owen, and the jury so found. The trial court's judgment, affirmed on appeal, properly awarded to Owen the relief to which he was entitled.

Because the decision of the Court of Appeals is eminently correct and the Petition for Writ of Certiorari does not present matters of sufficient consequence to warrant this Court's review of this case on certiorari, Respondent Charles Owen respectfully prays that the Petition for Writ of Certiorari be refused.

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## CERTIFICATE OF MAILING

I, Terry Gardner, Attorney for Respondent Charles Owen, do hereby certify that the foregoing Reply to Petition for Writ of Certiorari has been served upon Mr. Henry W. Simon, Simon & Simon, Baker Building, Fort Worth, Texas 76102, Attorney for Respondent Nor-Tex Agencies, Inc., and W. E. Riley; upon Mr. Clyde M. Marshall, Jr., Callaway & Marshall, 1302 W. T. Waggoner Building, Fort Worth, Texas 76102, Attorney for Petitioner Richard M. Jones; upon Mr. Ogden K. Shannon, Jr., Shannon, Gracey, Ratliff & Miller, 2700 Continental National Bank Building, Fort Worth, Texas 76102, Attorney for Respondent Continental National Bank; and, upon The Solicitor General of the United States, Department of Justice, Washington, D. C. 20530 by depositing true copies of the same in a United States mail box, postage prepaid, on the 1st day of February, 1974.

Terry Gardner

## APPENDIX

Section 27.01, Bus. & Com. Code of Texas

Section 27.01 Fraud in Real Estate and Stock Transactions

(a) Fraud is a transaction involving real estate or stock in a corporation or joint stock company consists of a

(1) false representation of a past or existing material fact, when the false representation is

(A) made to a person for the purpose of inducing that person to enter into a contract; and

(B) relied on by that person in entering into that contract; or

(2) false promise to do an act, when the false promise is

(A) material;

(B) made with the intention of not fulfilling it;

(C) made to a person for the purpose of inducing that person to enter into a contract; and

(D) relied on by that person in entering into that contract.

(b) A person who makes a false representation or false promise, and a person who benefits from that false representation or false promise, commit the

fraud described in Subsection (a) of this section and are jointly and severally liable to the person defrauded for actual damages. The measure of actual damages is the difference between the value of the real estate or stock as represented or promised, and its actual value in the condition in which it is delivered at the time of the contract.

(c) A person who wilfully makes a false representation or false promise, and a person who knowingly benefits from a false representation or false promise, commit the fraud described in Subsection (a) of this section and are liable to the person defrauded for exemplary damages not to exceed twice the amount of the actual damages.